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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-585

JACKSON SAWMILL COMPANY, INC., et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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The Jackson Sawmill Company, Allen G. Bohmer, Dr. Paul T. Scoggins and the Reverend David D. McKee petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered July 12, 1978.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit has not, as of yet, been published but is printed in the Appendix at page A-1. The August 4, 1977 Memorandum

Opinion of the District Court is unpublished, but is printed in the Appendix at page A-31. The March 11, 1977 Memorandum Opinion of the District Court is published at 428 F.Supp. 555 (E.D.Mo. 1977), and is printed in the Appendix at page A-58.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); and this Petition has been timely filed, in accordance with 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED

Do citizens who invest in bonds issued by a local governmental unit and secured only by a local and state governmental pledge of protection have any redress under the Constitution of the United States against federal governmental action that violates that pledge and results in the destruction of their investment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the Constitution of the United States, provides in relevant part:

> No State shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts. . . .

Amendment V of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1-102, Chapter 121, Ill. Rev. Stat. 1975 provides in relevant part:

> "It is the declared and continuous policy of the legislature to provide for improvement of highways and the highway transportation system as well as the preservation of investment in highways."
>
> . . . .

Section 10-802, Chapter 121, Ill. Rev.Stat. 1975 provides in relevant part:

> "Each municipality has the power:
>
> . . . .
>
> (4) To borrow money, make and issue bonds payable from and secured by a pledge of the net revenue of the bridge for the acquisition, construction, reconstruction, improvement, enlargement, betterment or repair of which such bonds may be issued.
>
> . . . .
>
> (6) To make contracts of every kind and nature and to execute all instruments necessary or convenient for the carrying out of the purposes of this Division of this Article;
>
> (7) Without limitation of the foregoing to borrow money and to accept grants from the United States or any person and to enter into contracts with the United States and such person in connection therewith."

Section 10-803, Chapter 121, Ill.Rev.Stat. 1975 provides in relevant part:

> "Without limiting any other powers granted in this Division of this Article, each municipality has the power to provide for the payment of the cost of acquiring, constructing, reconstructing, improving, enlarging, bettering or repairing any bridge or for the payment of any portion of such cost by one or more issues of revenue bonds of the municipality, payable solely from the net revenue of such bridge. These bonds shall be authorized by ordinance of the corporate authorities of the municipality and shall be in substantially the form set forth in the ordinance.
>
> . . . .
>
> It shall be plainly stated on the face of each bond in substance that the bond has been issued under the provisions of this Division of this Article and that the taxing power and general credit of the municipality issuing the bond are not pledged to the payment of the bond, or interest thereon, and that the bond and the interest thereon are payable solely from the net revenue of the bridge to acquire, construct, reconstruct, improve, enlarge, better or repair which the bond is issued."

Section 10-804, Chapter 121, Ill.Rev.Stat. 1975 provides in relevant part:

> "An ordinance authorizing bonds under this Division of this Article may contain provisions which shall be part of the contract with the holders of the bonds, as to . . .
>
> (7) other agreements with the holders of the bonds or covenants or restrictions necessary or desirable to safeguard the interests of these holders."

Section 10-809, Chapter 121, Ill.Rev.Stat. 1975 provides:

> "All proceedings theretofore taken by any municipality under this or any prior Act for the acquisition, construction, reconstruction, improvement, enlargement, betterment or repair of any bridge over any river forming a boundary of this State, and all revenue bonds issued by any municipality for the financing of the acquisition, construction, reconstruction, improvement, enlargement, betterment or repair thereof are hereby ratified, validated and confirmed."

STATEMENT OF THE CASE

The Plaintiffs invested in bridge revenue bonds. They were induced to invest in the bonds by a pledge contained in the Bond Indenture given by the government of the City of East St. Louis and "ratified" by the State of Illinois (Sec. 10-809, Chapter 121 Ill. Rev. Stat. 1975) that a competing bridge would not be constructed within the immediate vicinity of the toll bridge they were financing. A few years after the bonds had been issued, a competing bridge was, nevertheless, constructed at the direction of the United States Government, which had been informed beforehand that the Petitioners had essentially no security interest in their toll bridge bonds other than the pledge of no competing bridges in the vicinity. Because of the close proximity of the competing bridge, almost all of the toll bridge traffic was siphoned away, and the property rights of the bondholders, particularly their "exclusive franchise" right, were destroyed. As authorized by 28 U.S.C. § 1331, the Petitioners filed a Complaint on behalf of the bondholders in the District Court of the Eastern District of Missouri. Before any discovery could be conducted, the Complaint was summarily dismissed for failure to state a claim upon which relief could be granted. (The two Memorandum Opinions of the District Court are printed in the Appendix at page 31 and page 58.) On July 12, 1978 a three-member panel of the Eighth Circuit

unanimously affirmed the District Court's dismissal, ruling, in effect, that the Petitioners' property rights under the bonds were neither protected by the Fifth Amendment, nor any other provision in the United States Constitution.

More specifically, in the early 1950's the United States and the State of Illinois encouraged the City of East St. Louis, Illinois to construct an expressway extension on the eastern approach of the Veterans Memorial Toll Bridge, which was subsequently renamed the Martin Luther King Bridge (hereinafter "MLK Bridge"). The City of East St. Louis was unable to finance its share of the construction costs; however, under Illinois Law the necessary financing could be obtained by selling bonds to the public. (The relevant statutes are set forth on pages 1-2 of this Petition.)

In order to induce investors to purchase MLK Bridge bonds, the public was offered the following covenant:

> "The City covenants that, until the Bonds secured hereby and the interest thereon shall have been paid or provisions for such payment shall have been made, it will not construct or cause or permit (where such permission is necessary) to be constructed a bridge, any part of which lies within the corporate limits of the City and which will, or may, divert traffic from the Veteran's Memorial Bridge with resultant decrease in revenues derived from the operation of the Veteran's Memorial Bridge." Article VII, §7.14 of the Trust Agreement.

Because the bondholders were expressly denied the remedy of compelling a levy of taxes in the event the toll revenues were not sufficient to meet the obligations of the bond contract, the bondholders relied almost exclusively on this covenant. As their only form of security interest in the bonds, this covenant was the crucial pledge of protection for the bondholders. Without this covenant, or some other comparable security interest, it is unlikely that the MLK Bridge bonds could have been sold to the public.

A few years after the bonds were issued and traded, the United States Government directed and financed the construction of a "free" bridge within a few hundred yards of the MLK Bridge. This "free" bridge, known as the Poplar Street Bridge, opened on November 10, 1967; and, as a result of its availability, the vehicular traffic on the MLK Bridge diminished to a trickle of what it had been. By January 1, 1974, the MLK Bridge bonds were in default.

Because they felt that they had been unconstitutionally deprived of their property, the Petitioners filed a Complaint in the Eastern District of Missouri. The Petitioner's allegations of the United States Government's prior approval and knowledge of the covenant and the direct injury that the United States Government caused the Petitioner's property rights are set out in detail in the Petitioner's Second Amended Complaint (Appendix at page 36) and, therefore, need not be repeated here. It is interesting to note, however, that in its Answer to the Petitioners' Complaint the City of East St. Louis stated the following: One, the United States Government authorized the financing obtained from the bondholders for the MLK Bridge (Appendix at page 69); two, at a public hearing the United States "overruled" the City's objection to the construction of a bridge which would be competitive with the MLK Bridge (Appendix at page 67); and three, "the bondholders have suffered by reason of the building of the Poplar Street Bridge by the United States of America" (Appendix at page 69-70).

In spite of such allegations of injury caused by the United States Government, the District Court and the Court of Appeals have ruled, as a matter of law, that the Fifth Amendment of the Constitution does not afford the Petitioners any protection.

(The Petitioners had also alleged causes of action against the States of Illinois and Missouri, but the Court of Appeals has ruled that such actions are barred by the Eleventh Amendment of the Constitution. The Petitioners do not contest the Court's ruling with respect to the Eleventh Amendment.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Summarily Decided a Novel, Constitutional Question in a Way That Both Conflicts With the Applicable Decisions of This Court and Sanctions a Departure From the Accepted Usual Course of Judicial Proceedings.

A writ of certiorari should not be granted except in cases involving principles of public importance. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). Petitioners believe that this is one of those cases. More is involved here than the private interests of a small group of bondholders (although approximately $7,000,000.00 in bonds are in default because of the action of the United States). This Court is not being asked to save a group of individuals from a bad investment. Neither this Court, nor any other court, is in the business of protecting private investors from foreseeable risks. The Petitioners, however, do believe that our courts are in the business of protecting the public from governmental disregard for, and destruction of, private property rights.

In addition, if the dismissal of this case is left to stand, the public's confidence in a particular portion of the municipal bond market will be, and should be, seriously eroded. It is one thing for bonds to go into default because of economic realities. It is quite another thing, however, when bonds go into default because the federal government in conjunction with state governmental bodies decides to do precisely what the bondholders had been guaranteed it would not do. If the United States Army Corps of Engineers had, in the public interest, dynamited the MLK Bridge, would there be any doubt about the bondholders' constitutional right to just compensation? If the United States Department of Transportation had, in the public interest, barricaded all access to the MLK Bridge, would there be any doubt tbout the bondholders' constitutional

right to just compensation? Why is the situation in a *real, practical* sense any different when, instead of dynamite or barricades, the United States Government uses federal dollars for the construction of a competing bridge to destroy the bondholders' property rights? In its Opinion, the Court of Appeals ruled that the Federal Government "took nothing, directly or indirectly, that belonged to the appellants [bondholders]." See Appendix at page 9. The Petitioners respectfully disagree. Even if it had dynamited the bridge, the United States Government could not have more effectively destroyed the bondholders' property rights. Are the bondholders unprotected by the Fifth Amendment simply because the Federal Government used more subtle means than explosives to accomplish the destruction of the bondholders' property?

In their Second Amended Complaint, the Petitioners attempted to allege causes of actions against the United States under both the traditional "without just compensation" language of the Fifth Amendment, and the less traditional, implied reference in the Fifth Amendment to the impairment of contract language in Article I, Section 10 of the Constitution. The Court of Appeals, however, expressly ruled that the Petitioners could not show the "direct" injury required for "just compensation", and, after hinting that the Fifth Amendment has no relationship to Article I, Section 10, it also stated that, in any event, an "obligation" owing to the bondholders had not been impaired. The ruling of the Court of Appeals is in conflict with this Court's major decisions on the relationship between the Fifth Amendment and Article I, Section 10, toll bridges, municipal bonds and exclusive franchises.

A. The Fifth Amendment and Article I, §10

While Article I, §10 does not restrict federal action, the Due Process Clause of the Fifth Amendment does limit the power of the United States Government to impair contracts. As one commentator has observed:

> "[A]lthough there is no clause expressly forbidding the federal government to pass laws impairing the obligation of contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be a deprivation of property without due process contrary to the Fifth Amendment." Hale, "The Supreme Court and the Contract Clause," 57 Harv. L.Rev. 852, 890 (1944).

Professor Hale's observation that the Fifth Amendment prohibits the United States Government from impairing contracts is undoubtedly correct, for this Court, as well as other federal courts, have consistently so held. For example, in *Hepburn v. Griswold*, 75 U.S. (8 Wall) 603 (1870), this Court ruled that while Article I, §10 does not apply directly to the United States, and while the United States may perhaps, in the exercise of an express power, incidentally impair the obligations of a contract, the spirit of Article I, §10 pervades the entire Constitution, and the United States is prohibited by the Constitution, specifically the Fifth Amendment, from directly impairing the obligations of a contract.

> "It is true that this prohibition [i.e., Article I, §10] is not applied in terms to the Government of the United States . . . But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency . . .
>
> Another provision, found in the 5th Amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National Government . . ." Id. at 623-24.

B. The Toll Bridge Cases.

A legislature may create a franchise which constitutes property in the constitutional sense. Once conferred, a franchise, like other property, can be taken only by the exercise of the power of eminent domain and upon just compensation. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). Furthermore, because it carries obligations as well as privileges, a franchise, once accepted, constitutes a contract protected by Article I, §10 of the United States Constitution. *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51 (1866). In order to determine if a franchise constitutes a valid contract, the courts inquire as to whether the franchise is exclusive or nonexclusive.

In *Charles River Bridge v. The Warren Bridge, et al.*, 36 U.S. (11 Pet.) 420 (1837), the State of Massachusetts, which had several years earlier granted a charter to a private corporation to construct a toll bridge, decided to incorporate another company that would build a free bridge only a few hundred feet away from the toll bridge. The owners of the toll bridge complained that the act of Massachusetts authorizing the construction of a free bridge impaired the obligations of the charter that had been granted to them. The Court found there was no unconstitutional impairment because the complainants had not been granted an exclusive franchise.

> "This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on complainants the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company is authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. *No right* to erect another bridge themselves, nor *to prevent other persons from erecting one. No engagement from the State that another shall not be erected*, and no undertaking not to sanction

> competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent . . ." *Id.* at 548-49. (Emphasis added.)

The Charles River case suggests the following question. Would the result be different for complainants who could demonstrate that they had been granted an "exclusive privilege", and that there was an "engagement from the State that another bridge shall not be erected"?

This Court was not long in affirmatively answering that question. In *The Binghamton Bridge, supra,* the State of New York, by an 1805 enactment, authorized a turnpike company to build a bridge and provided that no other bridge was to be built within two miles. In 1855, however, New York chartered another company to build near the first bridge. The existence of the second bridge caused a substantial reduction in the amount of tolls taken on the first bridge. The Court held that the contract with the company that owned the first bridge had been unconstitutionally impaired. The reasoning of the Court would appear to apply equally well to the case at bar.

> "Has the legislature of 1855 broken the contract with [sic] the legislatures of 1805 and 1808 made with the plaintiffs? The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel . . . *The restraint was on the legislature itself. The plain reading of the provision that 'it shall not be lawful for any person or persons to erect a bridge within a distance of two miles', is that the legislature will not make it lawful by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public.* The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is *within the protection of the Constitution of the United States,* it follows that the charter of the Binghamton Bridge Company is null and void." 70 U.S. at 81-82. (Emphasis added.)

In *Binghamton Bridge*, it was in effect, the "direct and inevitable" injury to an exclusive bridge franchise that caused the Court to find that the authorization of a competing bridge constituted an unconstitutional impairment of contract. If, as held by this Court in *Binghamton*, a state is prohibited by Article 1, §10 from impairing an exclusive right to bridge traffic, does it not necessarily follow that the United States, under the principles set forth in *Hepburn*, is likewise prohibited by the Fifth Amendment from impairing an exclusive right to bridge traffic? In other words, by reading *Binghamton* and *Hepburn* together, the Constitution prohibits both the states and the United States from impairing an exclusive franchise.

Petitioners believe the *Binghamton* decisions stands for the following proposition: If a franchise is in its terms exclusive, the legislature is prohibited from chartering a competitor without compensating the holders of the first franchise. The relevancy of *Binghamton* to the case at bar is undeniable. Of course, the Petitioners are not franchisees, *per se*, but major bridges today are not built by private corporations chartered by the State. Today, bridges are built either with tax dollars or with the dollars invested by state or municipal bondholders. The Petitioners, who were granted a covenant that a competing bridge would not be constructed within the corporate limits of East St. Louis, believe that they have the same rights as had the

franchisee in *Binghamton*. If this is decided not to be so, then why should private citizens invest in municipal revenue bonds in the future? The public would have little reason to buy municipal revenue bonds if it becomes known that the United States Government can destroy the bondholder's only form of security interest with impunity.

C. **United States Trust Co.**

The recent decision of *United States Trust Co. v. State of New Jersey*, 431 U.S. 1 (1977), would appear to be extremely relevant to the question of whether the Petitioners in this action have alleged a constitutionally protected property interest. Before explaining its decision in favor of the bondholders, this Court made some factual observations that could be applied almost equally well to the case at bar. Because the state governments involved would not offer their taxing power as security, other forms of security had to be devised in order to induce the public to invest in Port Authority bonds. For example, in 1925 both of the states involved enacted statutory covenants that guaranteed competitive bridges would not be constructed within the district of the Port Authority. *Id.* at 5 n. 5. In 1962, in order "to promote continued investor confidence in the Authority", the states covenanted that they would not exceed a specified "limitation on mass transit deficit operations." *Id.* at 9. As the Court pointed out, "[i]n return for their promise, the states received the benefit they bargained for: public marketability of Port Authority bonds to finance construction of the World Trade Center and acquisition of the Hudson and Manhattan Railroad." *Id.* at 18. In 1974, the states decided that they would no longer honor the 1962 covenant; and, therefore, it was repealed retrospectively.

In the present case the Petitioners have alleged a similar factual situation. Because "the taxing power and general credit of the municipality issuing the bond [may] not [be] pledged to

the payment of the bond" (Ill. Rev. Stat. 1975, Chapter 121, § 10-803), private investors had to be offered other forms of security before they could be expected to loan money for the reconstruction of the MLK Bridge. The security offered the bondholders was in the form of a covenant guaranteeing that a competing bridge would not be constructed within the corporate limits of the City of East St. Louis. At some point in time, however, a decision was made by the United States Government to build a free bridge within the corporate limits of the City of East St. Louis.

Although *United States Trust Co.* involved a state's violation of Article I, §10, this Court described the bondholder's property rights in the language of the Fifth Amendment: "contract rights are a form of property and as such may be taken for a public purpose provided just compensation is paid". *Id.* at 19 n. 16. The Petitioners respectfully submit that under *United States Trust Co.* their contract rights as bondholders of MLK Bridge revenue bonds are a form of constitutionally protected property. It matters not whether such property is destroyed by a state retroactively repealing legislation or by the United States constructing a competing bridge. What matters is whether the property has been directly destroyed by governmental action.

In its Opinion, the Court of Appeals held, in effect, that *United States Trust Co.* is inapplicable to cases where "no attempt was made to use the law, federal or state, to repudiate a contractual obligation". See Appendix at page 18. This must be an incorrect interpretation of *United States Trust Co.;* otherwise, the injurious results which government is prohibited from accomplishing by means of the enactment of a statute would not be prohibited if they are accomplished by means other than the enactment of a specific statute. Once again, if the United States had exercised less subtlety and simply demolished the MLK Bridge, or if Illinois had retroactively repealed the statute authorizing the bond covenant, there would be no question about whether the bondholders' property rights merit

the protection of the Constitution. There is nothing in the Fifth Amendment limiting its application to cataclysmic destruction of property; nor is there anything in the Fifth Amendment limiting its application to those rare instances when government has the temerity to use the enactment of a specific statute to destroy property rights. What is far more likely to result in the deprivation of rights in this day of massive government is, as happened here, the quiet decisions of bureaucrats acting under general statutory authority, taking actions that, in the name of the United States, destroy the rights of individuals. *If the Constitution can not protect against that kind of activity*, it will be of little assistance against the incursions of greater and more numerous bureaucratic assaults on private rights and freedoms in the years to come. Petitioners do not believe the Constitution is so impotent as to allow a federal bureau to do what the Congress could not do.

D. **Franchises Cases**

In addition to being in conflict with *The Binghamton Bridge* and *United States Trust Co.* cases, the Opinion of the Court of Appeals is also in conflict with this Court's leading decisions on exclusive franchises.

Franchises have long been considered important property interests protected by the Fifth and Fourteenth Amendments. *See, e.g., City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); and *Binghamton Bridge Co.*, 70 U.S. (3 Wall) 51 (1866).

In *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919), this Court ruled that a municipality may not take away a franchise to establish and charge for an electric street lighting system without providing just compensation. The Court described a franchise as a form of property protected by the Fifth Amendment.

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation." *Id.* at 39.

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), the Monogahela Navigation Company had, under the express authority of the State of Pennsylvania, expended substantial sums of money in improving the Monongahela River. In addition to receiving authorization for the project from the State, the Monogahela Navigation Company had received encouragement from the United States to proceed with the project. In exchange for making valuable improvements on the river, the Monongahela Navigation Company was granted a franchise to collect tolls from the river traffic. After substantial improvements had been made by the company, the United States initiated judicial proceedings to condemn the company's upper lock and dam. At the initial hearing, the property was valued without taking into consideration the company's franchise to collect tolls. The company appealed and eventually this Court was confronted with the question of whether there is a constitutionally protected property interest in a franchise to collect tolls. This Court held that there is. A franchise to collect tolls is a vested right, which the State has the power to grant, but which may be retaken only if the franchisee is justly compensated. *Id.* at 341.

The language in *Monongahela* would appear to be most relevant to the question of whether the Petitioners have properly stated a claim under the Fifth Amendment.

"The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner.

. . . .

So before this property can be taken away from its owners the whole value must be paid; and that value depends largely upon the productiveness of the property; the franchise to take tolls." *Id.* at 328-29.

. . . .

"And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has the power to take the property, it does not follow that it may destroy the franchise without compensation. . . . If the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for because it is a substantial element in the value of the property taken." *Id.* at 336-37.

. . . .

"The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation." *Id.* at 341.

The Petitioners see little, if any, significant difference between the property interests of the Monongahela Navigation Company and the property interests of the MLK Bridge bondholders. In both cases, the property owners paid valuable consideration for the right to receive income from tolls. In both cases, the value of their interests "depended largely upon the productiveness of the property: the franchise to take tolls." In both cases, the franchise to collect tolls was vested in the property owners. Given all of these similarities between the Monongahela Navigation Company and the MLK Bridge bondholders, is it not clear that Petitioners have stated a valid claim under the Fifth Amendment?

E. **Abutting Landowner Cases**

In denying the Petitioner's "inverse condemnation claim", the Court of Appeals seems to have relied substantially on several state cases involving abutting landowners. The Court of Appeals appears to have endorsed the District Court's conclusion that the MLK Bridge bondholders have failed to state a cause of action because "there is no property right or vested interest in a continuing flow of traffic". See Appendix at page 8. The Petitioners respectfully submit that there are two reasons why the Court's of Appeal and the District Court's reliance on the state abutting landowner cases is misplaced.

First, federal, and not state law, is controlling with respect to whether a particular property interest is protected by the Fifth Amendment. *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 279 (1943).

Second, abutting landowners have no more than an expectancy in traffic. They conduct their businesses fully aware of the risk that the construction of a median divider, overpass or highway may cause them a substantial loss in business. The MLK Bridge bondholders, however, had much more than an expectancy in traffic. They bargained for, and supposely received, vested property rights in the form of an exclusive franchise. The Petitioners, totally unlike abutting landowners, had more than a collateral interest in traffic; they bargained for a covenant protecting them against direct injury to their property rights as a result of construction of a competing bridge. Petitioners respectfully submit that the dismissal of Petitioners' Complaint would not have been affirmed if the Court of Appeals had relied on the Court's rulings in *Binghamton* and *Monongahela*, rather than various state abutting landholder cases. The consti-

tutional dimensions of the Petitioners' franchise rights are clearly delineated in *Binghamton* and *Monongahela,* and yet, there is not a single reference to either one of these decisions in the Court's of Appeals Opinion.

F. **Conley v. Gibson**

Finally, Petitioners believe that the ruling of the District Court and the Court of Appeals represents a drastic departure from the mandate of *Conley v. Gibson,* 355 U.S. 41 (1957), where it was held:

> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.

The question of whether there has been a Fifth Amendment taking is a fact question that should not be prematurely dismissed. As this Court stated in *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958), "[t]raditionally, we have treated this issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." In its Opinion, the Court of Appeals offered the following explanation for why *Central Eureka Mining Co.* is inapplicable to the Petitioners' action:

> "Although it is true that whether a particular government restriction amounts to a constitutional taking normally turns on the facts of each case, here the government action did not "restrict." The federal government simply helped build and finance a new bridge." Appendix at page 9.

While the Petitioners do not understand the significance of the conclusion of the Court of Appeals that "here the government action did not "*restrict*", the Petitioners do believe, if they had been given the opportunity to conduct normal discovery, they

would have been able to demonstrate to the satisfaction of both the District Court and the Court of Appeals that the Federal Government did much more than "simply" help build and finance a new bridge.

CONCLUSION

For the foregoing reasons, Petitioners request a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Service

Frederick Leicht, Jr., appearing on behalf of Jackson Sawmill Co., Allen G. Bohmer, Dr. Paul T. Scoggins and Rev. David D. McKee, certifies, as a member of the Bar of the United States Supreme Court, that three copies of this Petition have been sent via first class mail to each of the counsel of record, the Solicitor General of the United States and the Department of Transportation of the United States.

Fred Leicht, Jr.

APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 77-1768

Jackson Sawmill Company, Inc., a corporation, Allen G. Bohmer, Dr. Paul T. Scoggins, and the Reverend Daniel D. McKee,

Appellants,

v.

The United States of America; The Honorable William T. Coleman, individually and as Secretary of Transportation of the United States; The Honorable Daniel Walker, Governor of the State of Illinois; Langhorne M. Bond, individually and as Secretary of the Department of Transportation of the State of Illinois; The Department of Transportation of the State of Illinois; The City of East St. Louis; William Mason, individually and as Mayor of the City of East St. Louis; Jack Curtis, individually and as Chairman of the State Highway Commission of Missouri; The State Highway Commission of Missouri; The Illinois State Toll Highway Authority; The Honorable Joseph Teasdale, Governor of the State of Missouri; The State of Missouri and The State of Illinois,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 11, 1978

Filed: July 12, 1978

Before BRIGHT and ROSS, Circuit Judges; and TALBOT SMITH, Senior District Judge.

BRIGHT, Circuit Judge.

Holders of municipal bonds issued by the City of East St. Louis, Illinois (the City), brought this class action against several federal, state, and local government entities after the City defaulted on the bonds. The district court[1] dismissed the bondholders' second amended complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. The bondholders then brought this appeal. The basic issue raised on appeal is whether the dismissal was premature given the liberal construction of pleadings mandated by the Federal Rules of Civil Procedure. This question necessarily implicates two considerations: (a) whether the state defendants are entitled to absolute immunity under the eleventh amendment, and (b) whether the complaint states a cause of action against the other defendants, assuming all the allegations in the complaint are true.

I. Background

The bondholders alleged the following facts in their complaint. In the early 1950's, traffic volume increased substantially between the cities of St. Louis, Missouri, and East St. Louis, Illinois, connected by bridges across the Mississippi River.

[1] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri. Judge Wangelin has filed two memorandum opinions in connection with this case. The first, dated March 11, 1977, is published at 428 F. Supp. 555 (E.D. Mo. 1977). The second, dated August 4, 1977, is unpublished.

In spite of the burgeoning problem, the States of Illinois and Missouri and the United States failed or refused to build new bridges.

The City determined, however, that it would construct an expressway extension on the eastern approach of the Veterans Memorial Toll Bridge (subsequently renamed the Martin Luther King Toll Bridge, to which we refer as the King Bridge) in order to ease the traffic problem on its side of the river. To implement the improvements, the City entered into an agreement with the Department of Transportation of the State of Illinois that called for the City to pay for a portion of these highway improvements and Illinois to pay for the remainder. The City was also encouraged to make the improvements by the State of Illinois and the United States, which arranged to include the expressway extension in the Interstate Highway System.

In order to finance the City's portion of the construction cost of the extension and to refinance bonds previously issued to build the bridge,[2] the City, as authorized by Illinois law, executed a trust agreement with the St. Louis Union Trust Company providing for the issuance of $15.5 million worth of municipal bonds. According to the appellants, the trust agreement expressly provided that the toll rates of the bridge would be subject to regulation by the United States and that the United States had participated in an agreement with the Department of Transportation of Illinois and the City to provide for construction of the extension. Finally, the trust agreement called for payment of both principal and interest on the bonds wholly from tolls and other bridge revenues but stipulated that the City would not permit construction of a rival bridge within the city limits that would divert traffic and diminish revenues. Relying on the latter guarantee and the actions and implied good faith

[2] The City of East St. Louis, Illinois, owns the bridge.

of the City, the State of Illinois, and the United States, the appellants purchased the City's bonds.

At some time after January 1, 1956, however, defendant city, state, and federal governments determined to build a new bridge across the Mississippi connecting St. Louis and East St. Louis. This bridge, the Poplar Street Bridge, opened on November 10, 1967, and was constructed in such a manner that it was easily accessible from all of the major federally-financed highways leading to East St. Louis. Traffic over the King Bridge diminished, and by January 1, 1974, declining revenue forced the City to default on the bridge bonds.

The bondholders thereafter commenced the present class action on June 30, 1976, against the City, the States of Illinois and Missouri, the United States, and several state, local, and federal officials. For relief, the bondholders sought

> an order compelling defendants to condemn the MLK Bridge and to compensate the bondholders thereof, and to take over and to integrate said MLK Bridge into the interstate traffic needs of the cities of St. Louis and East St. Louis and the surrounding areas in the State of Illinois and Missouri; or in the alternative for damages suffered as a result of defendants' actions in the sum of the principal and interest owed as of the date of judgment; and for an order for reasonable attorney's fees and costs of court.

This appeal follows from the district court's dismissal, on August 4, 1977, of bondholders' second amended complaint for failure to state a claim on which relief can be granted under Rule 12(b)(6).

II. The Issues

The dismissed complaint contaained two causes of action.[3] Count I was an inverse condemnation claim apparently premised on the fifth and fourteenth amendments and the state constitutional counterparts:

> By means of the above-stated acts of the defendants various harm, damages and wrongs have been suffered by the plaintiffs and the plaintiffs have been denied their property without receiving just compensation, without having received due process, and without having had their property condemned, all in violation of the Constitution and the Statutes of the United States of America and the State of Illinois and the State of Missouri. Plaintiffs have no adequate remedy at law.

Count II was an impairment of contract claim, basically resting on article I, section 10, of the Constitution (as against the state and local defendants) and incorporation of article I, section 10, by the fifth amendment (as against the federal defendants):

> Plaintiffs allege and state that as authorized by the Constitution and Statutes of the State of Illinois, the City of East St. Louis contractually covenanted with the plaintiffs in the Trust Agreement of January 1, 1956 that it would not contract or cause or permit the construction of a bridge any part of which would lie within the corporate limits of the City, and which would or might divert traffic from the MLK Bridge with a resultant decrease in revenues derived from the operation of the MLK Bridge with a resultant decrease in revenues derived from the operation

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[3] Federal jurisdiction was asserted pursuant to 28 U.S.C. §§ 1331, 1358, 1361 (1970). Venue was alleged under 28 U.S.C. §§ 1391 (b), 1403 (1970).

of the MLK Bridge. After the City of East St. Louis entered into such a covenant with plaintiffs, the State of Illinois expressly ratified, validated and confirmed said covenant, and all other obligations attendant to the revenue bonds now held by plaintiffs, by enacting Section 10-809 of Chapter 121 of the Illinois Revised Statutes. As a consequence, the subsequent enactments, appropriations and actions of the City of East St. Louis, the State of Illinois and the other Illinois defendants, and the State of Missouri and the other Missouri defendants, and the United States and other federal defendants, permitting creating or encouraging the construction of a bridge within the boundaries of the city limits of East St. Louis, are void and in violation of the Constitution of the United States, specifically Article One, Section Ten, and the Fifth and Fourteenth Amendments thereto, and the Constitution of the State of Illinois, specifically Article One, Section Sixteen, and the Constitution of Missouri, specifically Article One, Section Thirteen, as impairing the obligation of a contract.

We now consider whether the district court was justified in dismissing both of these causes of action based on the pleadings. In reviewing the dismissal of the complaint under Rule 12(b)(6), we are mindful of the Supreme Court's admonition in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

We also note a summary of the applicable rule of law in *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974):

> [A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. [Citations omitted.]

A. **The inverse condemnation claim.**

1. **Against the United States.**

Appellants' theory of recovery against the United States[4] for deprivation of property without just compensation rests on the fifth amendment of the United States Constitution, which provides in pertinent part that

> private property [shall not] be taken for public use, without just compensation.

The district court dismissed this claim against the United States because

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[4] The appellants also sued William T. Coleman, Secretary of Transportation of the United States at the time the lawsuit was filed. Because any recovery against him would come out of the United States Treasury, we conclude that the cause against him is identical to the cause against the United States. We also note that appellants have not made any distinction between their theory of recovery against former Secretary Coleman and their theory of recovery against the United States.

the law is clear in Missouri and Illinois that plaintiffs do not have a constitutionally protected property right in traffic. Thus, the diversion of traffic is not a compensable taking under the due process requirements of the Illinois, Missouri and United States constitutions. *Kansas City v. Berkshire Lumber Co.*, 393 S.W.2d 470 (Mo. 1965); *State v. Brockfield*, 388 S.W.2d 862 (Mo. en banc 1965); *Department of Public Works and Buildings v. Wilson & Co.*, 62 Ill. 2d 131, 340 N.E.2d 12 (1975); *County of Winnebago v. Rico Corp.*, 11 Ill. App. 3d 882, 296 N.E. 2d 867 (1973). *Cf. Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Peters) 420, 9 L.Ed. 773 (1837).

Most of these cases deal with abutting landowners to highway systems and not bondholders. However, this does not change the basic premise that there is no property right or vested interest in a continuing flow of traffic. Plaintiffs have cited no cases even remotely supporting their position. Defendants' motions to dismiss Count I will be granted.[5] [*Jackson Sawmill Co. v. United States*, 428 F. Supp. 555, 558 (E.D. Mo. 1977).]

In support of the argument that the district court improperly dismissed the inverse condemnation claim against the United States, appellants contend that the court misconstrued the issue as a question of law rather than as a question of fact. Appellants view the issue as not whether diversion of traffic constitutes compensable taking but rather whether diversion of traffic caused direct damage to their vested property rights. As such, according to appellants, the question is factual rather than legal. Appellants cite for support of their contention *United*

[5] The quoted material is from the court's memorandum decision issued on March 11, 1977, dismissing a prior complaint. In its decision on August 4, 1977, dismissing the present complaint, however, the court readopted its prior holding as applicable to the United States defendants.

States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958), where the Supreme Court stated:

> Traditionally, we have treated the issue as to whether a particular *governmental restriction* amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. [Emphasis aded.]

Finally, appellants argue that the district court completely failed to address their contentions that they possessed at least four other property interests: an exclusive franchise, an easement, a lien, and various vested contract rights.

Although it is true that whether a particular government restriction amounts to a constitutional taking normally turns on the facts of each case, here the governmental action did not "restrict." The federal government simply helped build and finance a new bridge. It took nothing, directly or indirectly, that belonged to the appellants. The fifth amendment

> has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. [*Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870.)]

In this case, appellants possessed no constitutionally protected interest in a monopoly over traffic travelling between St. Louis and East St. Louis. Whether they choose to label their interest a "franchise," an "easement," a "lien," or simply as "contract right" matters little. Under no interpretation of the facts, no matter how we strain to be favorable to their claim, do appellants have anything more than two covenants issued by the City of East St. Louis. The covenants entitle them to an exclusive right to revenues from the King Bridge and stipulate that the City will not voluntarily permit the construction of a bridge that interferes

with appellants' revenue rights. The United States acquired no property interest from appellants entitling them to compensation regardless of the label attached to the appelalnts' contract rights with the City.

2. **Against the States of Missouri and Illinois.**

Appellants' inverse condemnation claim against the States of Illinois and Missouri was premised on the fourteenth amendment's absorption of the *just compensation* clause of the fifth amendment. The district court dismissed the claim against both states relying on the eleventh amendment bar:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Analyzing the district court's ruling requires a three-tiered approach: First, we must determine which of the various defendant-government entities qualify as a state or an alter ego of the state; second, we must decide whether or not the eleventh amendment applies to the cause of action brought by the bondholders; and third, we must assess whether affected defendants have waived the eleventh amendment immunity.

a. **Qualification as a "State."**

By its terms, the eleventh amendment only applies to suits against a state by citizens of another state.[6] In addition to the States of Missouri and Illinois, however, several state officials

[6] The plaintiff class unquestionably includes nonresidents of Illinois and Missouri, satisfying the "Citizens of another State" requirement of the eleventh amendment.

and agencies are named as defendants.[7] Appellants argue that the district court erred by giving the officials and agencies the same eleventh amendment immunity applicable to the states. In particular, appellants note that the district court failed to consider any of the several factors customarily used to determine if a particular state agency should be entitled to share the state's eleventh amendment immunity. The cite *Fitzpatrick v. Bitzer*, 519 F.2d 559, 564-65 (2d Cir. 1975), *rev'd on other grounds*, 427 U.S. 455 (1976):

> In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an "alter ego" of the state, a court must look to numerous factors, no one of which is conclusive, see *Krisel v. Duran*, 258 F. Supp. 845, 848-49 (S.D.N.Y. 1966) (Weinfeld, J.), *aff'd per curiam*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042, 88 S.Ct. 1635, 20 L.Ed.2d 303 (1968); *Zeidner v. Wulforst*, 197 F.Supp. 23 (E.D.N.Y. 1961); cf. *State Highway Comm'n v. Utah Const. Co.*, 278 U.S. 194, 199, 49 S.Ct. 104, 73 L.Ed. 262 (1929). The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. *Whitten v. State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974) (Moore, J.); *Gordenstein v. University of Delaware*, 381 F.Supp. 718, 721 (D.Del. 1974); *Bowen v. Hackett, supra; Krisel v. Duran, supra*, 258 F. Supp. at 849; see *Edelman v. Jordan, supra*, 415 U.S. at 663, 94 S.Ct. 1347. Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has the power to sue and be sued and enter into

[7] The state officials and agencies named as defendants include Daniel Walker, former Governor of Illinois; Langhorne Bond, Secretary of the Department of Transportation of Illinois; the Department of Transportation of the State of Illinois; the Illinois State Toll Highway Authority; Joseph Teasdale, Governor of Missouri; Jack Curtis, Chairman of the State Highway Commission of Missouri; and the State Highway Commission of Missouri.

> contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. See *Whitten v. State University Const. Fund, supra*, 493 F.2d at 179-80; *Gordenstein v. University of Delaware, supra; Krisel v. Duran, supra.*

Although the district court did not explicitly discuss this issue in its memorandum decision, we are convinced that it was correct in assuming, *sub silentio*, that the various state agencies and officials were entitled to share in the states' eleventh amendment immunity, if any.[8] The key, of course, is who will pay for any judgment rendered in favor of appellants. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest * * *." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). In this case, it is beyond dispute that the states will pay for any judgment rendered against defendant state officials and agencies.[9]

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[8] Appellants also note that in *State ex rel. State Highway Commission of Missouri v. Bates*, 296 S.W. 418, 420 (Mo. 1927), the Missouri Supreme Court held that the Missouri Highway Commission "is in no sense entitled to immunity from suit, as is the state." *Bates*, however, was a contract action against the state by state residents. It involved not the eleventh amendment but rather an interpretation of Missouri state law on the right of a Missouri citizen to sue the agency. Subsequently to the *Bates* case, the Missouri courts have consistently held that the State Highway Commission of Missouri is an agent of the state and therefore not subject to tort liability without its consent. *See, e.g., Luttrell v. State Highway Commission of Missouri*, 379 S.W.2d 137 (Mo. App. 1964); *Broyles v. State Highway Commission of Missouri*, 48 S.W.2d 78 (Mo. App. 1932). We construe *Bates* to mean that the State Highway Commission of Missouri is liable to suit in state court on a contract to which it is a state party. Neither of these requirements is met in this case.

[9] We also reject appellants' contention that this question goes to merits, rather than to jurisdiction, and thus is an issue of fact rather than law. While it may be true that in some contexts a "fact" question arises, it is clear to us that all of the relevant facts were before the district court and that nothing further could have been gained by allowing this issue to progress to trial. The court properly decided the issue on the pleadings.

b. **Applicability of the Eleventh Amendment.**

On its face, the eleventh amendment appears to bar "any suit in law or equity" commenced against a state by citizens of another state. In *Ex parte Young*, 209 U.S. 123 (1908), however, the Supreme Court ruled that the eleventh amendment does not bar a suit to enjoin enforcement by state officers of an unconstitutional state statute. In reaching this result the court relied on the legal fiction that a state officer acting illegally is deemed to act without the authority of the state and therefore outside its shield of sovereign immunity.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court further clarified the distinction it introduced in *Ex Parte Young*. There the Court ruled that the eleventh amendment bars any suit seeking a retroactive award of monetary damages payable out of the state treasury as compensation for a past breach of legal duty. The Court did not, however, that actions seeking injunctive relief are permissible even if they require the state to expend some public funds in implementing relief and thus even if the award has "an ancillary effect on the state treasury." *Id.* at 668.

In the present case, the district court held that:

> The relief sought in this case is like the retroactive payments in *Edelman*. An order requiring defendants to condemn the MLK Bridge would result in the purchase of defendants' bonds by the states. This would clearly be a payment of funds by the states to plaintiffs to compensate for past acts.

We agree and in doing so reject appellants' argument that deciding whether relief is either permitted by *Ex parte Young* or barred by *Edelman* cannot be done without full development of the case at trial. In this case, the answer plainly hinges on the prayer for relief in appellants' complaint. They are seeking

> an order declaring that said enactments, appropriations and actions constitute an unconstitutional impairment of plaintiffs' entitlement to the obligation of a contract; and for an order compelling defendants to condemn the MLK Bridge and to compensate the bondholders thereof, and to take over and to integrate said MLK Bridge into the interstate traffic needs of the cities of St. Louis and East St. Louis and the surrounding areas in the State of Illinois and Missouri; or in the alternative for damages suffered as a result of defendants' actions in the sum of the principal and interest owed as of the date of judgment; and for an order for reasonable attorney's fees and costs of court.

The prayer for relief in part asks for damages for past wrongful actions and, as we have already noted, the eleventh amendment expressly bars that remedy. It also appears to ask for equitable relief—an injuncton or mandamus directing the defendants to condemn the King Bridge, acquire it, and pay off the bondholders. This is but another verbalization of the claim for damages, however, and does not fall under the *Edelman* exception for injunctive relief. Appellants are asking for nothing more than that the defendants buy their "claims," which consist of the sums owed them by the bankrupt bridge. The *Edelman* proscription of retroactive damage payments would become a *reductio ad absurdum* if this action were permitted.

c. **Waiver.**

Even though we have ruled that the state defendants are entitled to eleventh amendment protection, the law is well settled that a state may waive its immunity. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883). The district court found no waiver by any of the state defendants:

> Recent cases construing the waiver doctrine have limited it to cases where a clear congressional intent to limit a state's sovereign immunity can be shown. *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, *supra*. The doctrine has no application to the facts of this case. "The threshold fact of congressional authorization to sue a class of defendants which literally includes states is wholly absent." *Edelman v. Jordan*, 415 U.S. at 672.
>
> This case is clearly distinguishable from *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), cited by plaintiffs. In that case Congress had approved a compact between the defendant states authorizing suits against the bridge authority. No such congressional action is present here. In sum, the Illinois and Missouri defendants must be dismissed from this action. This reasoning also applies to the individual defendants who are officials of the state.

Again, we agree with the district court. It is true that

> when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. [*Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 196 (1964).]

In order for waiver to occur, however, more than mere operation of an interstate bridge must occur. There must be some clear indication of congressional intention to condition state entry into the field upon waiver of immunity. For example, the Supreme Court in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), found an express waiver of immunity in the language of an interstate compact read in combination with a condition attached by Congress when it approved the compact. In *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279 (1973), the Supreme Court found no waiver after carefully reviewing the applicable federal

legislation. As the court in *Intracoastal Transportation, Inc. v. Decatur County*, 482 F.2d 361, 365 (5th Cir. 1973) stated:

> It is no longer sufficient merely to show that a State has entered a federally regulated sphere of activity and that a private cause of action is created for violating the applicable federal provision, but in addition the private litigant must show that Congress expressly provided that the private remedy is applicable to the States.

None of the statutory provisions cited by appellants[10] even remotely suggest that participating states waived their eleventh amendment immunity to lawsuits such as the present one.[11] *See, e.g., Daye v. Commonwealth of Pennsylvania*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); *Red Star Towing and Transportation Co. v. Department of Transportation of the State of New Jersey*, 423 F.2d 104 (3d Cir. 1970).

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[10] The General Bridge Authority Act, 33 U.S.C. § 525 *et seq.* (1970); the Rivers and Harbors Act, 33 U.S.C. §401 *et seq.* (1970); and the Federal-Aid Highways Act, 23 U.S.C. § 101 (1970).

[11] Appellants speculate that an interstate agreement exists between Missouri and Illinois concerning the Poplar Street Bridge and that it will be found at a later time via discovery. They contend that only after this agreement is found can it be determined whether or not waiver of eleventh amendment immunity occurred. While we entertain considerable doubt about the existence of such a compact, we note that the federal law cited by appellants contains no waiver requirement. Thus, this case is unlike *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

We also reject appellants' argument that if such an agreement were found the states would be "estopped" from asserting their eleventh amendment immunity. According to appellants, the agreement is an interstate compact requiring congressional ratification under article I, section 10, of the United States Constitution:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *.

Because the "compact" has not been expressly ratified by Congress, appellants claim that the states are "estopped" from their eleventh amendment immunity. Again, we doubt the existence of this compact. Assuming it does exist, however, we still do not believe that the state would be stopped from asserting their eleventh amendment immunity.

In sum, we find that, at least insofar as the inverse condemnation claim goes, the state defendants have retained their eleventh amendment immunity and the district court properly dismissed that action against the states.

3. Against the City and Mayor of East St. Louis.

The district court, after noting that the eleventh amendment did not apply to the City and its mayor, William Mason, dismissed the inverse condemnation claim against these defendants on the same grounds that it had relied on in dismissing the United States as a defendant: failure to establish a constitutionally protected interest. For the reasons set out in part II(A)(1) of this opinion, we affirm this ruling by the district court.[12]

B. Impairment of Contract Claim.

1. Against the United States.

Appellants' theory of recovery against the United States under this count was that the actions of the United States in the construction of the Poplar Street Bridge "impaired" the contract between appellants and the City of East St. Louis in violation of article I, section 10, of the United States Constitution:

> No State shall * * * pass any * * * law impairing the Obligation of Contracts * * *.

The district court dismissed the action as against the United States because article I, section 10, applies only to the states. Appellants contend that this was error because their theory of

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[12] Appellants may have a breach of contract action against the City because of the provisions in the trust agreement with the City wherein the City promised not to permit the construction of a rival bridge within the City. In their brief, however, appellants expressly deny that they made any attempt to plead a breach of contract claim.

recovery was actually premised on an incorporation of article I, section 10, by the fifth amendment, which does apply to the federal government.

It is easy to understand why the district judge failed to discuss this theory in his memorandum decision accompanying the order of dismissal, for appellants' pleadings do not give any clue that this is the theory on which they rely.

Even assuming that theory of recovery was properly pleaded, however, we reject that theory as without merit. The federal government took no action that "impaired" the contract between appellants and the City in a constitutional sense. As the district court noted, the City may well have breached its contract with the appellants. Moreover, we take as true the statements in appellants' pleadings alleging that the federal government was a silent partner in that agreement and aided in the breach. Nevertheless, an individual breach of contract such as the present one does not reach constitutional dimensions and create a cause of action based on the contracts clause. As the Supreme Court stated in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977):

> Although the Contract Clause appears literally to proscribe "any" impairment, this Court observed in *Blaisdell* that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."

In the *United States Trust Co.* case, the Supreme Court found an unconstitutional impairment of contract by the states of New Jersey and New York. The two states had passed similar statutes that repealed prior contractual obligations undertaken by the states. In the present case, in contrast, no attempt was made to use the law, federal or state, to repudiate a contractual obligation. Assuming the obligation did exist, all defendants were open to a suit for breach of contract. In short, appellants have

confused impairment of performance of a contract with impairment of the obligation of the contract. The Constitution does not provide a federal action for simple breach of contract.

2. **Against the States and the City.**

Appellants rely directly on article I, section 10, in their cause of action against the states and the City for impairment of contract. We find no greater merit to appellants' claim against the states and City than we did with respect to their claim against the United States. No state or local law or action impaired the "obligation" of their contract. Based on our discussion in part II(B)(1), we dismiss the cause of action against the states and the city as well.

III. **Conclusion.**

In sum, the district court properly dismissed both causes of action against all of the defendants. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

JUDGMENT

United States Court of Appeals
For the Eighth Circuit

No. 77-1768 September Term, 1977

Jackson Sawmill Company, Inc., a corporation, Allen G. Bohmer, Dr. Paul T. Scoggins, and the Reverend Daniel D. McKee, Appellants, v. The United States of America; The Honorable William T. Coleman, individually and as Secretary of Transportation of the United States; The Honorable Daniel Walker, Governor of the State of Illinois; Langhorne M. Bond, individually and as Secretary of the Department of Transportation of the State of Illinois; The Department of Transportation of the State of Illinois; The City of East St. Louis; William Mason, individually and as Mayor of the City of East St. Louis; Jack Curtis, individually and as Chairman of the State Highway Commission of Missouri; The State Highway Commission of Missouri; The Illinois State Toll Highway Authority; The Honorable Joseph Teasdale, Governor of the State of Missouri; The State of Missouri and The State of Illinois, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

July 12, 1978

(See attached sheet for cost information.)

Order entered in accordance with Opinion:

/s/ ROBERT C. TUCKER
Clerk
U. S. Court of Appeals
8th Circuit

United States District Court
Eastern District of Missouri
Eastern Division

Jackson Sawmill Company, Inc., a Corporation, Allen G. Bohmer, Dr. Paul T. Scoggins, The Reverend Daniel D. McKee, Plaintiffs,

vs.

The United States of America, The Honorable William T. Coleman, Individually and as Secretary of Transportation of the United States, The Honorable Daniel Walker, Governor of the State of Illinois, Langhorne M. Bond, Individually and as Secretary of the Department of Transportation of the State of Illinois, The Department of Transportation of the State of Illinois, The City of East St. Louis, William Mason, Individually and as Mayor of the City of East St. Louis; Jack Curtis, Individually and as Chairman of the State Highway Commission of Missouri, The State Highway Commission of Missouri, The Illinois State Toll Highway Authority, The Honorable Joseph Teasdale, Governor of the State of Missouri, the State of Missouri, and The State of Illinois. Defendants.

No. 76-596-C(3).

DOCKET ENTRIES

Date	Proceedings
1976	
June 30	Complaint—Fld. Summons issued and to Marshal for service.
July 7	Marshal's Return—Summons executed by serving U. S. Attorney on 7/2/76. Two copies to Attorney Genl. and service on William T. Coleman, Sec. of Transportation by serving Mrs. Putney on 7/7/76.
July 9	Marshal's Return of Service—Served on City of East St. Louis by serving Peggy Harris, office Mgr. on 7/6/76. Service on Wm. Mason, by serving personally on 7/6/76. Service on Dept. of Transportation by serving Celeste Adams, authorized agent on 7/7/76. Service on Gov. Daniel Walker by serving Sharon Martin authorized agent on 7/7/76. Service on Langhorne M. Bond, Sec. of Transportation by serving Celeste Adams, authorized agent on 7/7/76.
July 15	Marshal's Return of Service—Served Jack Curtis, Chairman, State Highway Commission, State of Missouri on 7/6/76. Service on State Highway Commission of Missouri by serving Irene Wallenberg, Sec. on 7/8/76.
July 19	Entry of Appearance—Fld. Thomas H. Pearson as local attry. for Dft. State Highway Commission.
	Motion of Visiting Attorney—Fld. Moves for leave to appear and participate on behalf of Dft. State Hgwy. Comm.
	Motion of Dft. State Hwy. Comm. to Dismiss—Fld.
	Memo. in Support of Motion to Dismiss—Fld.
	Motion of State Hwy. for Extension of Time—Fld.
	Memo. in Support of Motion for Extension—Fld.

July 28 Motion for Extension of Time to File Responsive Pleadings—Fld. by Defts. Walker, Gov. of Ill. Bond, Sec. of Dept. of Trans. of Ill. and the Dept. of Trans. of St. of Ill.

Aug. 3 Reply Brief in Opp. to Deft. Jack Curtis' Motion to Dismiss—Fld. by Plff. by leave (JHM)

Aug. 16 Answer of the City of East St. Louis and William Mason, Indiv. and as Mayor of the City of East St. Louis—Fld.

Aug. 16 Motions fld. 7/19 and 7/28/76 submitted.

Aug. 18 Order (HWK,J)—Fld. Mtn of defts. Walker, Langhorn M. Bond and Depts. of Trans. Ill. for 40 day ext. to plead Granted. Defts shall answer at the same time as deft. U.S.A. Copy sent attys.

Aug. 31 Mtn for Extension of Time to 10/1/76 to File Pleadings—Fld. by U.S. and leave granted. (HKW,J) Copy sent attys.

Sept. 1 Answer of Deft. Jack Curtis Indiv. and as Chairman of the State Highway Comm. of Mo. and Answer of State Highway Comm. of Mo.—Fld.

Sept. 1 Alternative Motion of Deft. Curtis Indiv. and as Chairman, etc. and State Highway Comm of Mo. to Dismiss With Memorandum in Support—Fld.

Sept. 2 Motion for Extension of Time for Additional 20 day Extension of Time to File Responsive Pleadings—Fld. by defts. Gov. Walker and Bond, Sec. of Dept. of Trans.

Sept. 10 Motion fld. 9/2/76 submitted.

Sept. 13 Order (HKW,J)—Fld. Mtn of defts Daniel Walker and Langhorne M. Bond granted. Defts. to have responsive filed pleadings within 20 days of this date.

Sept. 14 Plff granted 30 days after deft U.S. and State Hwy Comm of Ills' mtns are filed within which to reply to St. Hwy Comm of Mo., St. Highway Comm of Ill and the U.S. Motions and briefs to dismiss in the above-entitled case—In Memo for Clerk, fld.

Sept. 15 Statement Required under Rule II(h) Rules of the U.S. Dist. Ct.—Fld. by Deft. Walker, Governor of Ill. and L. Bond.

Sept. 29 Motion to Dismiss With Memorandum in Support—Fld. by Defts., Gov. Daniel Walker, Langhorne M. Bond, Sec. of Dept. of Trans., individually and in their office, and Dept. of Trans. of State of Ill.

Sept. 30 Motion to Dismiss by Defts U.S.A. and Wm. T. Coleman With Memorandum in Support—Fld.

Oct. 7 Motion fld 9/30/76 submitted.

Oct. 19 Motion for Leave to File Amended Complaint and for Joinder of an Additional Party—Fld. and Granted by Endorsement.

Oct. 19 First Amended Complaint Class Action Ill State Toll Highway Authority added as Deft.—Fld. and Summons issued.

Oct. 26 Plff granted 30 additional days either after filing of ans or mtn by Ill. St. Toll Hwy Authority etc.—In Memo for Clerk, fld. by leave.

Oct. 27 Answer of Deft. Jack Curtis Indiv. and as Chairman of St. Highway Comm. of Mo., and of the St. Highway Comm. of Mo. to Plffs' First Amended Complaint—Fld.

Oct. 27 Alternate Motion of Deft. Jack Curtis Indiv. and as Chairman of St. of Mo. & Mtn of Deft. St. Hwy Comm of Mo. to Dismiss Plffs' First Amended Complaint—Fld.

Nov. 17 Marshal's Return to Summons and Complaint—Fld. Svd. on M. Binder, Chairman of Ill. St. Toll Hwy Authority.

Nov. 19 Motion to Dismiss Plffs' First Amended Complaint—Fld. by U.S.A. and Wm. T. Coleman, Sec. of Transportation of U.S.A.

Nov. 26 Motion to Dismiss Plffs First Amended Complaint—Fld by Hon. D. Walker, Langhorne M. Bond.

Dec. 3 Motion to Dismiss as to the Ill. State Toll Highway Authority—Fld.

Statement Required Under Rule II(H) designation S. S. Fishman as local atty.—Fld.

Dec. 3 Memorandum in Support of Motion to Dismiss—Fld.

1977

Jan. 3 Plffs granted to and inc. 1/11/77 to file memorandum to 4 separate motions (HKW,J)—In Memo for Clerk, fld.

Jan. 13 Plffs Consolidated Memorandum in Opposition to Motions to Dismiss, with Exhibit. Req. for Oral Argument—Fld. Oral Argu. Req.

Mar. 11 Memorandum (HKW,J)—Fld.

Order (HKW,J)—Fld. In acc. with Memorandum, inc. in order. Defts' motions to dismiss action Granted in Part and Denied in Part. Defts. Jack Curtis, Wm. T. Coleman, the St. Highway Commission of Mo., the Ill. State Toll Hwy Authority and the U.S. dismissed from action. Copy sent attys. of record.

Mar. 22 Motion to Dismiss Complaint with Memorandum in Support—Fld. by Defts. Daniel Walker, Langhorne

M. Bond, indiv. and as Sec. of Dept. of Transportation and Dept of Transportation, St. of Ill.

Mar. 28 Motion for Leave to File an Amended Complaint and for Joinder of Additional Parties—Fld. by Plffs.

Mar. 28 Order (HKW,J)—Fld. Leave to file Amended Complaint Granted; Order of Ct. of 3/11/77 stayed until further order of Court. Copy sent attys. of record.

Mar. 28 Second Amended Complaint Class Action—Fld. Summons issued new defts.

Mar. 29 Motion fld. 3/22/77 submitted.

Apr. 4 Marshal's Return to Summons and Complaint—Fld. Svd. on Gov. Thompson of Ill. 3/30/77.

Apr. 7 Motions of Defts State Highway Commission of Missouri and of Jack Curtis, Indiv. and as Chairman of the State Hwy. Comm of Mo. for Extension of Time to Plead With Memorandum in Support—Fld. "So Ordered, HKW,J" Additional time to plead to coincide with the time for pleading of Defts. Jos. Teasdale, Gov. and the State of Mo. Copy of endorsed motion mailed attys of record.

Apr. 12 Marshal's return to summons—fld. Personally svd. Betty Mueller executed on 4/7/77.

Apr. 18 Motion to Dismiss the Second Amended Complaint as to the Ill. State Toll Highway Authority with Memorandum in Support—Fld by Ill. St. Toll Hwy. Authority

Apr. 18 Request for Extension for Time to File Answer with Memorandum in Support.—Fld. by Ill. Defts. D. Walker, L. M. Bond, Sec. of Ill. Dept. of Trans., Ill. Dept. of Trans and St. of Ill.

Apr. 19 Order (HKW,J)—Fld. Defts' motion for extension of time in which to file answer denied. Copy sent attys. of record.

Apr. 25 Memorandum for Clerk—Fld. Illinois Defts are ordered to file responsive pleadings on or before May 6, 1977. Copy of Memorandum for Clerk, mailed attys. of record.

Apr. 25 Order (HKW,J)—Fld. Plffs will be given 5 days from date of this order to file motion to reconsider the Ct's Memorandum and Order of 3/11/77, defts' time for answering plffs' amended complaint shall be stayed until motion is ruled on, etc. Copy sent attys. of record.

Apr. 27 Defts Teasdale and State of Mo. for Extension of Time to Plead—Fld. "Moot" as per Law Clerk.

May 2 Memorandum for Clerk—Fld. Plffs granted to and inc. 5/6/77 to file their Motion to Reconsider and Memorandum in Supp. thereof.

May 6 Memorandum for Clerk—Plffs' request for a continuance to 5/13/77 to file memorandum regarding 11th Amendment and long arm jurisdiction, Granted. (JFN,J)

May 6 Plffs' Motion to Reconsider with Memorandum in Support—Fld.

May 13 Memorandum of Defts Jack Curtis Indiv and as Chairman of the St. Hwy Comm. of Mo. and of the St. of Mo. in Opposition to Plffs' Motion to Reconsider—Fld.

May 13 Supplemental Memorandum on Eleventh Amendment in Opposition to Ill. Defts' Motion to Dismiss Plffs' First Amended Complaint—Fld.

May 19 Motion fld. 5/6/77 submitted.

May 24 Defts Joseph Teasdale's & State of Missouri's Mtn for Extension of Time in Which to Plead, With Proposed Order—Fld.

May 26 Motion to Permit Intervention of Certain Bond Holders Possessing a Community of Interest, Etc., with Notice of Hearing to Intervene, Etc.—Fld. by Morton H. Jaffee, et al. Atty. Neal L. Grossman.

June 1 Supplemental Memorandum—Fld.

June 2 Memo for Clerk—Fld. Filed by leave, Sheila S. Fishman withdraws at Attorney of Record for Attorney General of Illinois. She will no longer be resident of Eastern District of Mo. No transmittal letter, copy to Andrew Vrtjak, Illinois State Toll Highway Authority.

June 3 Motion fld. 5/24/77 submitted.

June 3 Motion fld. 5/26/77 submitted.

June 3 Order (HKW,J)—Fld. Leave is extended to defts to file responsive pleadings on or before 6/23/77. cc: Attys.

June 3 Order (HKW,J)—Fld. Motion to intervene Denied. cc: Attys.

July 6 Notice to Take Depo of Jay W. Miller, 8/29/77 at 10:00 AM—Fld. by Plff.

July 20 Response of the U.S. to Plffs' Motion to Reconsider—Fld.

July 27 Supplemental Memorandum—Fld. by Plffs.

Aug. 4 Order and Memorandum—Fld. This action is dismissed and said dismissal shall be with prejudice as to defts United States of America, The Honorable William T. Coleman, the City of East St. Louis, Ill., and William Mason. So Ordered HKW. cc: attys., & cc: U.S. Atty.

Aug. 31 Joint Notice of Appeal—Fld. by Jackson Sawmill Co., Inc.; Allen G. Bohmer, Dr. Paul T. Scoggins, and the Reverend Daniel D. McKee, plaintiffs. Copy sent to attys. of record. Certified copy of Notice of Appeal and 2 certified copies of Clerk's docket entries delivered to Clerk of U.S.C.A. (Copy of Memorandum previously mailed West on instr. from Law Clerk).

Aug. 31 $250.00 cash deposited with Cashier as bond.

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Jackson Sawmill Company, Inc., et al.,
Plaintiffs,
vs.
United States of America, et al.,
Defendants.
No. 76-596C(3)

ORDER

(Filed in U.S. District Court August 4, 1977)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It is Hereby Ordered that this action be and is Dismissed; and

It Is Further Ordered that said dismissal shall be with prejudice as to defendants United States of America, The Honorable William T. Coleman, the City of East St. Louis, Illinois, and William Mason.

Dated this 4th day of August, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

MEMORANDUM

This is an action by holders of bonds issued by the City of East St. Louis, Illinois. The bonds financed improvements on the Dr. Martin Luther King Bridge (the MLK Bridge). The

bonds provide for payment only from the tolls collected on the MLK Bridge. In 1967 the opening of the Poplar Street Bridge, a free bridge, diverted a substantial volume of traffic from the MLK Bridge. As a result of decreasing revenues the bonds are now in default.

Plaintiffs brought suit on several theories seeking to have defendants assume the operation of the MLK Bridge by condemnation or other action. After a March 11, 1977 memorandum and order dismissed eight of nine counts of the complaint, plaintiffs obtained leave to amend the complaint. The amended complaint is based upon the due process clauses of the fifth and fourteenth amendments and Article I, Section 10, Clause 1 of the United States Constitution, the Contract Clause.[1] That Memorandum is published at 428 F. Supp. 555.

The matter is now before the Court to reconsider the March 11, 1977 Order which dismissed all theories of recovery except the Contract Clause claims. The state defendants urged in their first motion to dismiss that this suit is barred as to them by the eleventh amendment. The Court inadvertently failed to address that issue in the March 11, 1977 Memorandum and it will be considered now.

The eleventh amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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[1] The bond agreement prohibited the City of East St. Louis from building or allowing the building of another bridge within the City. The Contract Clause provides in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

[2] Even the recent case of *United States Trust Co. of New York v. New Jersey*, 45 U.S.L.W. 4418 (1977), cited by plaintiffs, was tried in the state court system of New Jersey.

Plaintiffs argue that the amendment does not apply here because of the nature of this suit and defendants' alleged waiver of their immunity. The Court does not agree.

It has long been held that the eleventh amendment applies to suits brought under the Contract Clause. *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *Hans v. Louisiana*, 139 U.S. 1 (1890). The mere allegation that a state has violated the federal Constitution does not serve to abrogate the eleventh amendment. The sole exception to this doctrine is a suit to enjoin activity by the state deemed unconstitutional. *Ex Parte Young*, 209 U.S. 123 (1908).

The scope of the *Ex Parte Young* exception was defined in *Edelman v. Jordan*, 415 U.S. 651 (1974). *Edelman* challenged the administration of a federally funded program by the State of Illinois on statutory and constitutional grounds. The court held that although Illinois had violated federal standards in the administration of the program, it could not be ordered to make retroactive payments. The eleventh amendment bars all but prospective enforcement of federal law against the states except where such relief is merely ancillary. *See also Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279 (1973).

The relief sought in this case is like the retroactive payments in *Edelman*. An order requiring defendants to condemn the MLK Bridge would result in the purchase of defendants' bonds by the states. This would clearly be a payment of funds by the states to plaintiffs to compensate for past acts.

The constraints of *Edelman v. Jordan* do not apply where the doctrine of waiver can be applied. Recent cases construing

the waiver doctrine have limited it to cases where a clear congressional intent to limit a state's sovereign immunity can be shown. *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, supra.* The doctrine has no application to the facts of this case. "The threshold fact of congressional authorization to sue a class of defendants which literally includes states is wholly absent." *Edelman v. Jordan,* 415 U.S. at 672.

This case is clearly distinguishable from *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959), cited by plaintiffs. In that case Congress had approved a compact between the defendant states authorizing suits against the bridge authority. No such congressional action is present here. In sum, the Illinois and Missouri defendants must be dismissed from this action. This reasoning also applies to the individual defendants who are officials of the state.

The Court's Order of March 11, 1977 dismissed the United States from this action. Plaintiffs' amended complaint restates, with some minor additions, claims that were ruled not to state a cause of action against the United States. Plaintiffs have also recently filed a supplemental memorandum alleging that the United States had prior notice of the bondholders' interest and the probable impact of the Poplar Street Bridge. The Court has considered the amended complaint and plaintiffs' motion to reconsider. However, the Court's prior decisions that plaintiffs do not have a constitutionally protected property interest and that no Contract Clause claim can be stated against the United States is not changed by these arguments. Accordingly, the United States will also be dismissed as a defendant.

The remaining defendants are the City of East St. Louis and its Mayor. The eleventh amendment does not apply to these defendants. Count I of the amended complaint is the "inverse condemnation" claim. The same reasoning regarding this claim

against the United States applies to this claim against the City of East St. Louis. Thus, plaintiffs' motion to reconsider as to Count I will be denied and it will be dismissed entirely.

Count II alleges a violation of the Contract Clause. When a city breaches or repudiates a contract it may well incur liability. However, its breach is not an "impairment" of an obligation that states a constitutional claim. *City of Dawson v. Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co.,* 197 U.S. 181 (1905). To the extent that Count II can be construed as a breach of contract claim, venue is not proper in this court. 28 U.S.C. § 1391. The Court rejects the contention that because the Dr. Martin Luther King Bridge extends into this district, the cause of action "arose" here. Accordingly, the East St. Louis defendants will also be dismissed from this action.

The Court's March 11, 1977 Order passed on the merits of plaintiffs' claim against the state defendants. Because this Memorandum dismisses the states on a jurisdictional theory, any decision on the merits of claims against them is improper. Accordingly, the Court hereby sets aside the March 11, 1977 Memorandum and Order to the extent that it decided the merits of any claim between the plaintiffs and the state defendants.

Dated this 4th day of August, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

SECOND AMENDED COMPLAINT-CLASS ACTION

(Filed in U. S. District Court March 28, 1977)

Second Amended Complaint-Class Action
Jurisdiction and Venue

1. This is an action to compel by mandamus, by mandatory injunction and/or declaratory judgment in the nature of mandamus, the condemnation of certain property for public use under the laws of the United States, more particularly, Amendments V and XIV of the Constitution of the United States, as hereinafter more fully appears; in the alternative, this action seeks damages under Article I, §10 of the United States Constitution, as hereinafter more fully appears.

2. The United States District Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1361, and 1358 giving jurisdiction over Federal questions, actions to compel an officer of the United States to perform his duty, and eminent domain and condemnation proceedings in which the United States has an interest, respectively, to the United States District Courts; and pursuant to the doctrine of pendent jurisdiction, giving jurisdiction over the related state questions presented in Count Two.

3. The claims which are the subject of this lawsuit arose within both the Southern District of Illinois and the Eastern District of Missouri, and, therefore, venue is properly with this Court pursuant to 28 U.S.C. §1391(b) and §1403.

4. This Court has jurisdiction over defendant United States of America because the real estate at issue is partially located within the Eastern District of Missouri, within the meaning of 28 U.S.C. §1403 and the defendant United States of America, participated in the wrong herein complained of, and has, in effect, "taken" the property of plaintiffs without condemning

same and without compensating plaintiffs therefor, and the claim herein asserted against the United States arose, in part, in the Eastern District of Missouri.

5. This Court has jurisdiction over defendant the Honorable William T. Coleman, Jr. (now the Honorable Brockman Adams), individually and as Secretary of the Department of Transportation of the United States, because it is the duty of said defendant to initiate condemnation proceedings to condemn the property herein previously "taken" and which is in danger of being destroyed by action of the United States, and because the United States Department of Transportation participated in the wrongs herein complained of, and the claim herein asserted arose, in part, in the Eastern District of Missouri.

6. This Court has jurisdiction over defendant Daniel Walker (now the Honorable James Thompson), individually and as Governor of the State of Illinois, because said defendant and his predecessors participated in the wrongs herein complained of, participated in the taking of the property of plaintiffs without condemning same and without compensating plaintiffs therefore, and the claim herein asserted against the said defendant arose within the Southern District of Illinois and the Eastern District of Missouri. The acts were performed on behalf of the State of Illinois, thereby granting jurisdiction of this Court over defendant State.

7. This Court has jurisdiction over defendants William Mason and the City of East St. Louis because said defendants participated in the wrongs herein complained of, said defendant City is the legal owner of the real property here in question, part of which is located within this district, and the claim herein asserted arose, in part, in the Eastern District of Missouri.

8. This Court has jurisdiction over defendant Langhorne M. Bond, individually and as Secretary of the Department of Transportation of the State of Illinois, the Department of Transportation of the State of Illinois, and the State Toll Highway Au-

thority because said defendants participated in the wrongs herein complained of, said defendants have participated in the taking of the property of plaintiffs without condemning same and without compensating plaintiffs therefor, and the claim herein asserted arose, in part, in the Eastern District of Missouri.

9. This Court has jurisdiction over defendant Jack Curtis, individually and as Chairman of the State Highway Commission of Missouri and also of the State Highway Commission of Missouri because said defendants participated in the wrongs herein complained of, and the claim herein asserted arose, in part, in the Eastern District of Missouri. Under federal law, the Constitution of Missouri and the Statutes of Missouri, these defendants are proper defendants as this is the state agency invested with exclusive and plenary power and duty on behalf of the State of Missouri to receive and administer all federal highway funds and apportionments. Sections 226.010 to 226.190 R.S. Mo.; Title 23 U.S.C.A.

10. This Court has jurisdiction over defendant, Joseph Teasdale, individually and as Governor of the State of Missouri, because he and his predecessors, in their role as Governor, have participated in the wrongs herein complained of, they have participated and continue to participate in the taking of plaintiffs' property without condemning the property and without compensating plaintiffs therefor, and the claim herein asserted against said defendant arose, upon plaintiffs' information and belief within the Eastern District of Missouri. The acts were performed on behalf of the State of Missouri, thereby granting jurisdiction of this Court over defendant State.

Service of Process

11. Defendants the United States may be served process within the Eastern District of Missouri, pursuant to Rule 4(d)(4).

12. Missouri Statutes § 506.500 provides for jurisdiction over any person or firm . . . or any corporation who in person or through an agent does any of the following . . . (2) the making of any contract within this state; (3) the commission of a tortious act within this state; (4) the ownership, use, or possession of any real estate situated in this state. Defendants William Mason and the City of East St. Louis have done all three of the above cited acts; defendants Dan Walker (now James Thompson), the Department of Transportation of the State of Illinois, Langhorne M. Bond, Secretary of the Illinois Department of Transportation and the Illinois State Toll Highway Authority have engaged in activities (3) and (4) within this state. Accordingly, service may be had on these defendants under Rule 4(e) of the Federal Rules of Civil Procedure.

13. Defendant Jack Curtis, Chairman of the State Highway Commission of Missouri may be served personally. The Commission may be served as a governmental organization of the State of Misosuri under Rule 4(d)(6) and under Rule 4(f).

13a. Service of process upon the defendant, Joseph Teasdale, may be had by delivering a copy of the Summons and a copy of the Second Amended Complaint-Class Action to the Honorable Joseph Teasdale, Governor and Chief Executive Officer of Missouri, as provided in Rule 4(d)(6) of the Federal Rules of Civil Procedure. Service over the State may be had by serving a copy of the Summons and a copy of the Second Amended Complaint-Class Action upon Joseph Teasdale in his role as chief executive officer under Rule 4(d)(6) of the Federal Rules of Civil Procedure.

14. Service of process upon the Honorable William T. Coleman, Jr. (now the Honorable Brockman Adams), Secretary of Transportation, may be had by serving the United States as provided in Rule 4(d)(4), and by delivering a copy of the Summons and a copy of the Complaint to the Secretary of Trans-

portation in Washington, D.C., as provided in Rule 4(d)(5) of the Federal Rules of Civil Procedure.

15. Service of process upon the defendant, Daniel Walker (now James Thompson), may also be had by delivering a copy of the Summons and a copy of the Complaint to the Honorable Daniel Walker, Governor and Chief Executive Officer of Illinois, as provided in Rule 4(d)(6) of the Federal Rules of Civil Procedure. The State of Illinois may also be served by serving the Honorable James Thompson as Chief Executive Officer under Rule 4(d)(6) of the Federal Rules of Civil Procedure.

16. Service of process upon the defendant, William Mason and upon defendant the City of East St. Louis, Illinois, may be had by delivering a copy of the Summons and a copy of the Complaint to the Honorable William Mason, Mayor and Chief Executive Officer of said defendant, as provided in Rule 4(d)(6) of the Federal Rules of Civil Procedure.

16a. Service of process upon defendants Langhorne M. Bond and the Department of Transportation of the State of Illinois, and upon defendant the Illinois State Toll Highway Authority may be had by delivering a copy of the Summons and a copy of the Complaint to Langhorne M. Bond, Secretary of the Department of Transportation of the State of Illinois and to Martin R. Binder, Chairman of Illinois State Toll Highway Authority, respectively, as provided in Rule 4(d)(6) of the Federal Rules of Civil Procedure.

The Parties

17. Plaintiff Jackson Sawmill Company is an Alabama corporation with its principal place of business in Jackson, Alabama.

18. Plaintiff Allen G. Bohmer is an individual who is a resident of Cincinnati, Ohio.

19. Plaintiff Dr. Paul T. Scoggins is an individual who is a resident of Commerce, Georgia.

20. Plaintiff The Reverend Daniel D. McKee is an individual who is a resident of Jackson, Mississippi.

21. Defendant United States of America is a government organized pursuant to a Constitution and Amendments thereto, which must act in accordance with said Constitution and Amendments, plus various Federal Statutes, and encompasses an area comprising 50 individual states, the District of Columbia and various territories.

22. Defendant William T. Coleman (now Brockman Adams), Secretary of Transportation of the United States of America is the Chief Executive Officer of the United States Department of Transportation and is a Cabinet Member of the defendant United States, who must act pursuant to laws established by the Congress of the United States of America and the Constitution of the defendant United States of America and, specifically, must act in accordance with the Constitution Amendment V as is hereinafter more completely set forth.

23. Defendant, Dan Walker (now James Thompson), Governor of the State of Illinois is Governor of said state, a governmental corporation organized pursuant to a State Constitution and amendments thereto, who must act in accordance with said State Constitution and amendments, and in accordance with the Constitution of the United States of America and its amendments as applied to the various individual states and particularly Amendments V and XIV thereto, plus various state statutes. The State of Illinois, as represented by its Legislature and Executive Department, must also conform to these same constitutional provisions.

24. Defendant City of East St. Louis is a municipal governmental corporation organized under the laws of the State of

Illinois and certain laws and ordinances which govern said city.

25. Defendant William Mason is Mayor of said City.

26. Defendant Langhorne M. Bond is Secretary of the Department of Transportation of the State of Illinois. The Department of Transportation of the State of Illinois and the Illinois State Toll Highway Authority are governmental agencies established by the Laws of Illinois, and said defendants' duties and obligations as they pertain to this cause of action are more fully hereinafter set forth. Defendants are the proper defendants with the powers and duties to act on behalf of the State of Illinois on questions pertaining to the administration of all federal highway funds, projects and apportionments. Section 101, Title 23 U.S.C.A., defining "state highway department".

27. Defendant, Joseph S. Teasdale, is the Governor of Missouri, a state of the United States of America organized pursuant to a State Constitution and amendments thereto. As Governor he must act, as his predecessors must have acted, in accordance with the Constitution of the United States of America and its amendments as applied to the various individual states and particularly Article I, § 10 and Amendments V and XIV of the United States Constitution, plus various state statutes and constitutional provisions. The State of Missouri, as represented by its Legislature and Executive Department, must also conform to these same constitutional provisions.

28. Defendant Jack Curtis, Chairman of the State Highway Commission of Missouri, and the State Highway Commission of Missouri are the proper defendants with the powers and duties to act on behalf of the State of Missouri on questions pertaining to the administration of all federal highway funds, projects, and apportionments. Sections 226.010 to 226.190 R.S.Mo.; Title 23 U.S.C., Section 101, defining "state highway department."

29. Plaintiffs are all holders of certain bonds issued by the City of East St. Louis to improve, operate, refinance, and

maintain a bridge now known as the Dr. Martin Luther King Bridge (hereinafter cited as "MLK Bridge") which crosses the Mississippi River at St. Louis, Missouri. Plaintiffs together hold a face value of bonds in the amount of approximately $500,000.00. These bonds were to be paid, as was the interest to accrue thereon from the toll revenues generated by vehicular crossings of said bridge. The remaining outstanding bonds total a face amount of approximately $7,275,000.00. The number of actual bondholders is approximately 500.

Class Action Allegations

1. *Description and Size of Class.* The plaintiffs represent the class of owners of the Bridge Revenue Refunding and Improvement Bonds issued pursuant to an ordinance of the City of East St. Louis enacted February 8, 1956. The Bonds issued thereunder had differing maturity dates, with the largest face value of outstanding bonds, approximately 80%, being held by bondholders with bonds that mature in 1985. These plaintiffs are the appropriate representatives of this class since one of them, Jackson Sawmill Company, Inc., is the second largest holder of these bonds, and the other three plaintiffs each hold smaller amounts of these bonds. The interests of all of the plaintiffs are similar to the interests of all other holders of the bonds.

2.(a) *The class is so numerous that joinder of all members is impracticable.* Class membership consists of a large number of bondholders, the exact number of which is unknown and unavailable to plaintiffs, but which can be estimated as approximately 500 in number. Furthermore, plaintiffs believe that many bondholders are unknown since a number of the bonds are unregistered, threby making it difficult, if not impossible, to join all of the bondholders in this action.

(b) *There are questions of law and fact common to class.* The primary questions of law and fact in this action are set

forth in this complaint. The questions of law which are common to and which will affect every stockholder involve the issue of this Court's power to compel the defendants to condemn the MLK Bridge and/or make it a part of the Federal-Aid Highway System, and this Court's determination of the question of whether or not there is an adequate remedy at law to plaintiffs considering the deteriorating condition of the MLK Bridge. These issues will call for an interpretation of the laws of the United States and the laws of the States of Illinois and Missouri, and will be determinative of the rights of all of the bondholders in this regard.

(c) *The claims of the representative parties are typical of the claims of the class and the defenses thereto are also typical.* The claims supporting plaintiff's allegations that defendants be compelled to condemn the MLK Bridge will be the same for every other bondholder. There will be no conflicts between bondholders concerning this equitable action. Defenses, if any, to be raised by defendants will also be common to all the bondholders and their respective interests.

(d) *The representative parties will fairly and adequately represent the interests of the class.* The plaintiffs represent the entire range of bondholders, both in size and number of bonds held, as well as in reasons for holding such bonds. Plaintiff Jackson Sawmill Company, Inc. is the holder of the second largest face value amount of bonds and represents the corporate and institutional holders of these bonds. Plaintiff Allan G. Bohmer is an individual who holds a substantial face value of these bonds for investment purposes. Plaintiffs Dr. Paul T. Scoggins and the Reverend Daniel D. McKee are individuals with smaller amounts in face value of these bonds who hold them for savings and as part of individual retirement plans. For all of these reasons, plaintiffs are the appropriate parties to represent the bondholders in this action. In addition, plaintiff Jackson Sawmill Company, Inc. was one of two plaintiffs

who successfully represented the largest sub-class of bondholders in a recent class action in the St. Louis Circuit Court.

3. *Requisites of Federal Rules of Civil Procedure Rule 23 (b)(2).* Rule 23(b)(2) of the Federal Rules of Civil Procedure allows the action to be maintained as a class action if, in addition to the prerequisites stated above, the parties opposing the class have refused to act on grounds generally applicable to the class, thereby making final injunctive relief, as requested herein, appropriate to the entire class. Condemnation of the MLK Bridge, if ordered, will affect the entire class in the same manner; and the MLK Bridge may be saved from total deterioration and be restored to usefulness for the entire Metropolitan Bi-State area.

Statement of Claim

1. On January 1, 1956 a Trust Agreement was executed between the City of East St. Louis, Illinois and the St. Louis Union Trust Company, Trustee, providing for the issuance of Fifteen Million Five Hundred Thousand Dollars ($15,500,000.00) in bonds known as "Bridge Revenue Refunding and Improvement Bonds" ("Bonds"). These bonds were issued by the City of East St. Louis, Illinois, in connection with certain transactions set forth more fully below pertaining to a certain highway toll bridge then known as "Veterans Memorial Bridge" across the Mississippi River from a point at or near the intersection of Third Street and Franklin Avenue in the City of East St. Louis to a point betwen Delmar Boulevard and Cole Street in the City of St. Louis, Missouri. Previously the City of East St. Louis, Illinois, had duly issued Ten Million Dollars ($10,000,000.00) principal amount of Bridge Revenue Bonds dated January 1, 1948 and One Million Dollars principal amount of Bridge Revenue Bonds dated July 1, 1950, to finance the cost of the construction of said bridge.

2. At the time of the issuance of the Trust Agreement on January 1, 1956, there was an outstanding Ten Million One Hundred Thousand Dollars ($10,100,000.00) of said Bridge Revenue Bonds dated January 1, 1948, and July 1, 1950.

3. Because of the greatly increased requirements to meet the growing traffic volume over said bridge, defendant, the City of East St. Louis, determined that it was necessary to construct an Expressway Extension from the eastern approach of said bridge which would connect into the federal highway system.

4. In furtherance of said plan and determination, defendant, the City of East St. Louis, entered into an Agreement with the Department of Transportation for the State of Illinois for the construction of said proposed Expressway Extension with the defendant the City of East St. Louis to pay a portion of said Expressway Extension and the Department of Transportation of the State of Illinois to pay a majority portion of said Expressway Extension.

5. In order to finance the City's portion of the construction cost of said Expressway Extension and to refinance the bonds previously outstanding which had been issued to pay for the construction of said Veterans Bridge, the City of East St. Louis entered into the aforementioned Trust Agreement dated January 1, 1956, covering the issuance of Fifteen Million Five Hundred Thousand Dollars ($15,500,000.00) in bonds, which said Trust Agreement had been duly authorized by the appropriate City of East St. Louis ordinance and was enacted pursuant to the constitution and statutes of the State of Illinois, including particularly Article XXVIII of the Revised Cities and Villages Act, and other applicable provisions of law.

6. Pursuant to said Trust Agreement the said defendant City of East St. Louis issued and sold to the general public Fifteen Million Five Hundred Thousand Dollars ($15,500,000.00) face amount of so-called Bridge Revenue Refunding and Improvement Bonds, which were purchased by the general public and have been traded in interstate commerce on the open market by the general public since that time.

7. The Trust Agreement provided in pertinent part that the bonds are payable as to both principal and interest wholly from the tolls and other revenues to be derived from the bridge.

8. On page 6 of said Trust Agreement and in Section 5.01 on page 42 of said Agreement it is provided that rates of tolls for traffic over said bridge shall be subject to regulation by the United States of America and the rates of tolls have been so subject to regulation by the United States of America since on or around January 1, 1956.

9. Page 34 of said Trust Agreement, Section 4.01, states that the United States of America was a party to or participated in an Agreement with the Department of Transportation of the State of Illinois and defendant the City of East St. Louis to provide for the construction of the Expressway Extension. Upon plaintiffs' best information and belief, said defendants the City of East St. Louis, the Department of Transportation of the State of Illinois and the United States of America did in fact enter into the Contract and Agreement to provide for the said Expressway Extension and thus encouraged the City of East St. Louis to enter into the said Trust Agreement aforementioned and to issue the Bonds issued thereunder and accordingly, all of said parties encouraged the general public, the owners of the bonds and the plaintiffs in particular, to purchase the said bonds to finance the Expressway Extension and the refunding of the then-named Veterans Bridge.

10. Since the issuance of the bonds called for by the Trust Agreement dated January 1, 1956, the said Veterans Bridge has been re-named the Martin Luther King Bridge and will be henceforth referred to in this Complaint as the MLK Bridge.

11. At all times the Department of Transportation of the State of Illinois and the defendant the United States of America encouraged the defendant the City of East St. Louis to build the MLK Bridge and defendants the Department of Transportation of the State of Illinois and the United States of America promised, agreed, and participated in arrangements whereby the MLK Bridge was an integral and vital part of the inter-state transportation system sponsored by the United States of America and the Highway Department of the State of Illinois.

12. In addition, the Illinois and Missouri defendants and the United States of America failed and refused to build, plan or undertake the construction of a trans-Mississippi bridge at St. Louis during the years of 1951 through January 1, 1956, or to construct a bridge suitable to be a part of the federal highway system and to handle the traffic crossing the interstate line between the State of Illinois and the State of Missouri at St. Louis. Rather, the said defendants, ignoring and failing to meet their duty to construct such bridge or bridges refrained from doing so and instead, in fact, encouraged the City of East St. Louis to construct such a bridge and entered into arrangements and agreements both written and oral assuring the City of East St. Louis that the MLK Bridge would be integrated into the highway system sponsored by and built by the defendants for purposes of transporting inter-state passengers throughout the United States and especially between the states of Illinois and Missouri at St. Louis.

13. Acting upon said agreements and assurances defendant the City of East St. Louis, Illinois, undertook to construct said MLK Bridge, and to issue bonds to the general public in order to finance said construction. The general public, including plaintiffs, also relying upon these actions as aforesaid of defendants bought said bonds as an investment, relying upon the good faith of said defendants not to take any actions detrimental to said investment. By these, and other actions unknown

to plaintiffs at this time, the defendants permitted and encouraged the plaintiffs and all other bondholders similarly situated to rely upon said actions and to make said investments in the said Bridge Revenue Refunding and Improvement Bonds and, consequently, to assume the responsibilities of the State of Illinois, the State of Missouri and the United States of America to build and improve and refinance an appropriate inter-state bridge at St. Louis.

14. Plaintiff Jackson Sawmill Company owns approximately Four Hundred Thousand Dollars ($400,000.00) face amount worth of bonds and is the second largest bondholder of the bonds. Plaintiffs Bohmer, McKee and Scoggins each hold more than Ten Thousand Dollars ($10,000.00) face amount of such bonds and together their aggregate holdings equal approximately an additional One Hundred Thousand or more of such bonds.

15. From the opening of the bridge in 1951 until 1966, the financial results of the bridge were excellent. Annual crossings rose from 5,616,612 in 1951 to 13,447,614 crossings in 1966. The gross revenues of the bridge rose from Six Hundred Fifty-Three Thousand Four Hundred Fifty-Two Dollars ($653,-452.00) in 1951 to Two Million Four Hundred Seventy-Two Thousand Eight Hundred and Twenty-Six Dollars ($2,472,-826.00) in 1966. The funds thus provided were adequate to operate and maintain the bridge in an appropriate manner and were two to three times more than sufficient to pay the debt service as to both principal and interest. A table setting forth the bridge operating results from 1951 to June 30, 1972 is attached to this Complaint as Exhibit A.

16. At some time after January 1, 1956, at a time unknown to plaintiffs, the defendants determined that a new free bridge would be built across the Mississippi at St. Louis and said defendants planned, designed, constructed and eventually opened

the so-called Poplar Street Bridge on November 10, 1967. In order to build the said Poplar Street Bridge the said defendants were obliged to obtain access for said bridge on and over land lying within the boundaries of the defendant the City of East St. Louis, and did obtain access on and over such land from the City of East St. Louis although the defendant the City of East St. Louis had covenanted in the Trust Agreement of January 1, 1956 that it would not permit the construction of any bridge on or within the boundaries of its city limits. Defendants fully knowing of said restrictions nevertheless acquired said rights of access from the City of East St. Louis as a part of the access way to the Poplar Street Bridge. As a part of the construction of the federal inter-state highway system defendants planned, designed and constructed access roads from all of the major federally financed highways leading to the City of East St. Louis and the City of St. Louis in such manner so that all traffic traveling on said federally financed highway had easy and open access to the Poplar Street Bridge, and since the opening of said Poplar Street Bridge have therefore, utilized said Poplar Street Bridge increasingly and almost exclusively. In addition, access to the MLK Bridge was severely limited by said defendants and, to all practical purposes, was essentially eliminated.

17. As a result of the design, plan and construction of said access roads, highways and the Poplar Street Bridge by defendants the traffic volume on the Poplar Street Bridge at certain hours of the day and night is too great for said bridge, the design load of traffic expected to be experienced not before 1990 is already exceeded, the highways are clogged, transportation is impeded and there is inadequate capacity to handle the persons traveling between the states of Missouri and Illinois.

18. In addition, because the Poplar Street Bridge is operated as a so-called "free bridge" meaning that it is financed by taxes paid by motorists to the State of Illinois, the State of Missouri, and to the United States of America and not by tolls paid by

persons using the bridge, the traffic using the MLK Bridge has been reduced to less than one-fifth of what it was prior to the opening of the Poplar Street Bridge by defendants the United States, the Department of Transportation of the State of Illinois and the Highway Commission of the State of Missouri.

19. As a result of this diversion of traffic from the MLK Bridge to the Poplar Street Bridge, due to the design and construction by said defendants of highways, access ways and the Poplar Street Bridge, the Martin Luther King Bridge has had its revenue reduced from Two Million Four Hundred Seventy-Two Thousand Eight Hundred and Twenty-Six Dollars ($2,472,826.00) in 1966 to less than Five Hundred Thousand Dollars ($500,000.00) in 1973 and said traffic and revenues are still declining. After paying necessary operating expense the amount available for maintenance and for debt service has steadily declined so that proper maintenance is not possible and, in addition, on January 1, 1974 a default in the payment of principal occurred and thereafter the bondholders have experienced a default in both principal and interest.

20. The Trustee of the Trust Agreement, the St. Louis Union Trust Company, upon finding that there were insufficient funds to make payment due of principal and interest on January 1, 1974, brought a Petition for Declaratory Judgment and for Instructions in the Circuit Court of the City of St. Louis against various bondholders as representatives of a class for the purpose of ascertaining how the remaining funds in the hands of the Trustee should be distributed among the bondholders. Said Case was cause No. 45146-F in the Circuit Court of the City of St. Louis. Plaintiff Jackson Sawmill Company and others petitioned the Court to represent all of the classes of bondholders except for the class of bondholders maturing in 1974 and said plaintiff Jackson Sawmill was appointed with others to represent said class.

21. Hearing was held on June 11, 1975 and in due course, on December 2, 1975 the Court entered its Findings of Fact, Conclusions of Law, Judgment and Decree.

22. Among other Findings of Fact the Court found that the action was a proper class action (paragraph 3(h)) and that plaintiff Jackson Sawmill Company, Inc. was a proper representative of all of the bondholders except for the holders of the class of 1974, which such exception is not applicable in this case.

23. In addition said Court found that "the effect of the opening of said new bridge was to cause a large diversion of traffic from the (MLK) bridge and a result of fallen revenues from bridge tolls. Prior thereto, such revenues had been more than sufficient to make all required payments of interest and principal on the bonds . . ."

24. The Court also found that "funds held by the Trustee on January 1, 1974 were insufficient to pay interest then due on the bonds and to pay the principal of the bonds which matured January 1, 1974 in the amount of Eighty-Five Thousand Dollars ($85,000.00). All interest due on said date was paid, but the balance then held by the Trustee in the amount of Forty-Four Thousand Nine Hundred Sixty-Four Dollars and Ninety-Eight Cents ($44,964.98) was not distributed pending a decision in this case."

25. The Court further found that "substantial amounts are now needed for the purpose of making necessary repairs to the bridge, for painting the same, and for providing for deferred maintenance of the bridge. The amounts so required exceed One Million Dollars ($1,000,000.00). The Court further finds that under present circumstances and conditions, there is no reasonable likelihood that future revenues from bridge tolls will be sufficient to provide funds for such repairs and maintenance and for the payment of interest on the bonds or for the retire-

ment of the bonds, either at their scheduled maturity dates or in the foreseeable future. Short of governmental action, which the Court finds has been sought by defendant City and by other interested parties without success, it appears to the Court that no practical method exists by which the bridge can be properly repaired, painted and maintained and the bonds can be paid."

26. The opinion of the Court entered on December 2, 1975 was not appealed and consequently became a final judgment. Thereafter, pursuant to said Judgment and Decree, small amounts, averaging less than Ten Dollars ($10.00) per Thousand Dollar ($1,000.00) bond have been distributed to the bondholders pro rata, which said amounts are insufficient to meet the required interest payment and make no effort to meet principal payments.

27. Plaintiff bondholders have had the value of their property taken and the bridge itself partially destroyed directly as a result of the actions of said defendants the United States of America, the Highway Department of the State of Illinois, the Highway Commission of the State of Missouri, and the City of East St. Louis. The actions of said defendants were wrongful for the following reasons:

A. In 1951 when the Veterans Bridge was built it was the duty of the United States of America and the highway authorities of the States of Missouri and Illinois to have provided appropriate and needed additional bridge capacity across the Mississippi River at the City of St. Louis, but the appropriate highway authority of the State of Missouri and Illinois and the United States of America did not so provide.

B. As a result of the failure of said defendants to so provide adequate inter-state transportation facilities across the river at the City of East St. Louis and the City of St. Louis, the defendant the City of East St. Louis agreed to do so and arranged to

sell bonds to private investors throughout the country who agreed to finance, and did so finance, said project which was needed and necessary for the adequate service of inter-state transportation across the river at the City of St. Louis. Said Bondholders therefore willingly agreed to provide the service which it was the duty of said defendants to provide.

C. Defendants the Department of Transportation of the State of Illinois and the United States of America agreed to the City of East St. Louis providing and building said bridge and, in fact, encouraged the providing of said facility by the City of East St. Louis and, ultimately, by the bondholders who purchased bonds issued by said defendant, City of East St. Louis.

D. At the time of the issuance of the Expressway Extension and Bridge Revenue Refunding Bonds in 1956, as aforementioned, defendant the Department of Transportation of the State of Illinois and defendant the United States of America further encouraged and agreed to the Expressway Extension project and said refunding operation, and said defendants the Department of Transportation of the State of Illinois and the United States of America agreed to assist in the construction of said Expressway Extension and to encourage the expenditure of sums to refinance the bridge and to construct said Expressway Extension. Said defendants arranged to locate the interstate highway system over said bridge and did so locate the federal highway system over the MLK Bridge, further encouraging plaintiffs to make their said investments.

E. Thereafter, in spite of the commitments which had been made by private citizens throughout the United States to finance and consequently undertake the responsibility to provide appropriate and necessary bridge facilities in inter-state transportation across the Mississippi at St. Louis, defendants thereafter agreed to build a new free bridge which they knew would, and in fact did, divert substantially all of the traffic, and revenues, from the MLK Bridge to the great detriment of plaintiffs.

F. Defendant the City of East St. Louis wrongfully and against the covenant in the Trust Agreement of January 1, 1966, agreed with the other defendants to provide access across land lying within the political subdivision of the City of East St. Louis, Illinois, to said defendants the United States of America and the Department of Transportation of the State of Illinois for purposes of constructing the physical supports and highway access roads and supports for said bridge.

G. The United States regulated the tolls of the MLK Bridge during the time the said bridge was in use as a part of the federal interstate highway system and as such exercised a high degree of dominion and control over the financial condition of same.

28. By means of the above-stated acts of the defendants various harm, damages and wrongs have been suffered by the plaintiffs and the plaintiffs have been denied their property without receiving just compensation, without having received due process, and without having had their property condemned, all in violation of the Constitution and the Statutes of the United States of America and the State of Illinois and the State of Missouri. Plaintiffs have no adequate remedy at law.

29. Wherefore, the plaintiffs ask the Court for an order compelling each defendant, where appropriate, and all the defendants, if appropriate to initiate condemnation proceedings against the MLK Bridge so that the defendants may fully acquire and take over said property and pay just compensation for same. Plaintiffs respectfully request the Court for an order that condemnation proceedings be initiated by the defendants with a view to acquiring said Martin Luther King Bridge; for an order to pay reasonable attorney's fees and costs of court, and for such other and further relief as to the Court seems proper.

Count Two

1. Come now plaintiffs in the above-style cause of action and for Count II of their Second Amended Complaint-Class Action restate and reallege each of the paragraphs set forth in Count One above as completely and as fully as if set forth in entirety at this point in this Complaint.

2. Plaintiffs allege and state that as authorized by the Constitution and Statutes of the State of Illinois, the City of East St. Louis contractually covenanted with the plaintiffs in the Trust Agreement of January 1, 1956 that it would not contract or cause or permit the construction of a bridge any part of which would lie within the corporate limits of the City, and which would or might divert traffic from the MLK Bridge with a resultant decrease in revenues derived from the operation of the MLK Bridge. After the City of East St. Louis entered into such a covenant with plaintiffs, the State of Illinois expressly ratified, validated and confirmed said covenant, and all other obligations attendant to the revenue bonds now held by plaintiffs, by enacting Section 10-809 of Chapter 121 of the Illinois Revised Statutes. As a consequence, the subsequent enactments, appropriations and actions of the City of East St. Louis, the State of Illinois and the other Illinois defendants, and the State of Missouri and the other Missouri defendants, and the United States and other federal defendants, permitting, creating or encouraging the construction of a bridge within the boundaries of the city limits of East St. Louis, are void and in violation of the Constitution of the United States, specifically Article One, Section Ten, and the Fifth and Fourteenth Amendments thereto, and the Constitution of the State of Illinois, specifically Article One, Section Sixteen, and the Constitution of Missouri, specifically Article One, Section Thirteen, as impairing the obligation of a contract.

Wherefore, plaintiffs pray this Court for an order declaring that said enactments, appropriations and actions constitute an

unconstitutional impairment of plaintiffs' entitlement to the obligation of a contract; and for an order compelling defendants to condemn the MLK Bridge and to compensate the bondholders thereof, and to take over and to integrate said MLK Bridge into the interstate traffic needs of the cities of St. Louis and East St. Louis and the surrounding areas in the State of Illinois and Missouri; or in the alternative for damages suffered as a result of defendants' actions in the sum of the principal and interest owed as of the date of judgment; and for an order for reasonable attorney's fees and costs of court.

Respectfully submitted,

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In the United States District Court for the
Eastern District of Missouri
Eastern Division

Jackson Sawmill Company, Inc., et al.,
Plaintiffs,
vs.
The United States of America, et al.,
Defendants.
} No. 76-596 C (3)

ORDER

(Filed in U.S. District Court March 11, 1977)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that defendants' motions to dismiss this action be and are Granted in part and Denied in part; and

It Is Further Ordered that defendants Jack Curtis, William T. Coleman, the State Highway Commission of Missouri, the Illinois State Toll Highway Authority, and the United States be and are Dismissed from this action.

Dated this 11th day of March, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

MEMORANDUM

This matter, pleaded in nine counts, is before the Court upon the motions of defendants to dismiss. The suit is based upon the following set of facts which are largely undisputed.

Plaintiffs are holders of bonds issued by the City of East St. Louis, Illinois. These bonds were used to finance improvements on the Veterans Memorial Bridge, now known as the Dr. Martin Luther King Bridge (hereinafter referred to as the M.L.K. Bridge). The M.L.K. Bridge spans the Mississippi River between St. Louis, Missouri, and East St. Louis, Illinois. Plaintiffs purchased the bonds in 1956 pursuant to a trust agreement executed by the City of East St. Louis. The agreement provided, *inter alia*, that all principal and interest payments would be satisfied from tolls and other revenues derived from the bridge.

In 1967, the Poplar Street Bridge, a free bridge, was opened near the M.L.K. Bridge. The Poplar Street Bridge has diverted substantial traffic volume away from the M.L.K. Bridge, reducing tolls collected. By January 1, 1974, the revenues derived from the M.L.K. Bridge were insufficient to meet the principal payments on plaintiffs' bonds and a default occurred. Since that time the bonds have been in default on both principal and interest payments.

Plaintiffs have petitioned this Court to order defendants to initiate condemnation proceedings against the M.L.K. Bridge, acquire it, and pay compensation to plaintiffs for their interest.[1] For the reasons stated below, defendants' motions to dismiss Counts I through VII and IX will be granted and the motions to dismiss Count VIII will be denied.

In Count I of their complaint plaintiffs have asserted that the construction of the Poplar Street Bridge, and the consequent diversion of traffic from the M.L.K. Bridge constituted a taking of property without just compensation. Essentially this is a claim for inverse condemnation. Plaintiffs assert that they have a property right in the traffic crossing the M.L.K. Bridge.

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[1] Plaintiffs have brought this suit as a class action but the Court will not determine the propriety of that procedure at this time.

Obviously traffic is necessary to generate revenue to meet the obligations on the bonds. However, the law is clear in Missouri and Illinois that plaintiffs do not have a constitutionally protected property right in traffic. Thus, the diversion of traffic is not a compensable taking under the due process requirements of the Illinois, Missouri and United States constitutions. *Kansas City v. Berkshire Lumber Co.*, 393 S.W. 2d 470 (Mo. 1965); *State v. Brockfield*, 388 S.W.2d 862 (Mo. en banc 1965); *Department of Public Works and Buildings v. Wilson & Co.*, 340 N.E.2d 12 (Ill. 1975); *County of Winnebago v. Rico Corp.*, 296 N.E. 2d 867 (Ill. App. 1973). *Cf. The Charles River Bridge v. The Warren Bridge*, 36 U.S. (11 Peters) 420 (1837).

Most of these cases deal with abutting landowners to highway systems and not bondholders. However, this does not change the basic premise that there is no property right or vested interest in a continuing flow of traffic. Plaintiffs have cited no cases even remotely supporting their position. Defendants' motions to dismiss Count I will be granted.

Count III of plaintiffs' complaint seeks an order compelling defendants to condemn, acquire, and maintain the M.L.K. Bridge under 23 U.S.C. § 104(b) and Ill. Rev. Stat., c.121, § 102, *et seq.* (1975). Section 104(b) provides for the apportionment of sums of money for expenditures on the various Federal-aid highway systems. Section 104(b) does not authorize or direct the expenditure of the money apportioned for specific projects, and thus does not provide for the relief that plaintiffs seek.[2] Defendants' motions to dismiss Count II will thus be granted.

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[2] Even if §1401(b) did authorize expenditures, the specific application of such expenditures would be within the sole discretion of various state administrative officials. It is a long settled doctrine that courts will not direct the performance of discretionary acts by administrative officials. *See* cases cited *infra.*

In Count III of their complaint plaintiffs seek an order compelling defendants to designate the M.L.K. Bridge as a part of the Federal-aid urban system under 23 U.S.C. § 103(d)(1), take the bridge by condemnation, and pay the bondholders for their interests. The M.L.K. Bridge has been designated as a part of the Federal-aid urban system since 1969. Section 103 (d)(1) does not authorize the expenditure of funds or condemnation of bridges. This section only sets out guidelines for the designation of a bridge as a part of the Federal-aid urban system making it eligible for participation in projects proposed under 23 U.S.C. § 105. Section 103(d)(1) does not authorize the relief sought and defendants' motions to dismiss Count II will be granted.

In Count IV plaintiffs seek to compel defendants to retire the bonds and assume management of the M.L.K. Bridge under 23 U.S.C. § 122. That section authorizes a state to make claims for payment out of sums apportioned to it under the Federal-aid system. The section only authorizes claims for expenditures actually used to make principal payments on bonds, the proceeds from which were expended on Federal-aid projects. As a matter of law, § 122 cannot apply to this case. Expenditures on the M.L.K. Bridge from the proceeds of the bonds held by plaintiffs were made prior to the enactment of § 122 and prior to the designation of the M.L.K. as a part of the Federal-aid urban system. Therefore, no proceeds of plaintiffs' bonds "have been actually expended in the construction" of a Federal-aid project. Section 122 makes no provision for retroactive application.

Further, even if retroactive application were possible, the section provides that states "may claim" payment. This language vests discretion with the administrative officers of the various states. It is a long settled doctrine that courts will not direct the performance of discretionary acts by administrative officials. *Wilbur v. United States*, 281 U.S. 206 (1930);

X (Bryant) v. Carlson, 363 F.Supp. 928 (E.D. Ill. 1973); *Langston v. Ciccone*, 313 F. Supp. 56 (W.D. Mo. 1970). Defendants' motions to dismiss Count IV will be granted.

Count V of plaintiffs' complaint is based upon the Special Bridge Replacement Program, 23 U.S.C. § 144. Under that statute states may apply to the Secretary of Transportation for assistance in replacing a bridge which the Secretary has found to be in need of replacement.

Plaintiffs seek an order compelling the state defendants to make application to the Secretary and compelling the Secretary to approve such application for the replacement of the M.L.K. Bridge. Again, there is no authorization in this statute for the relief sought. First, plaintiffs request the condemnation and acquisition of the M.L.K. Bridge and its subsequent replacement with itself, albeit with repairs. Plaintiffs assert that it would be less expensive to purchase and repair the M.L.K. Bridge than to replace it with a new bridge. Plaintiffs' concern with cost efficiency is commendable, but § 144 does not authorize the purchase and repair of existing bridges.

Furthermore, the pleadings reveal that no action has been taken by either Illinois or Missouri to seek the replacement of the M.L.K. Bridge. Nor has the Secretary of Transportation determined the need for such replacement. Section 144 places these actions by federal and state authorities within their sole discretion. *Wilbur v. United States, supra.* Thus, defendants' motions to dismiss Count V will be granted.

Count VI of the complaint seeks an order integrating the M.L.K. Bridge into the Federal-aid Interstate System under 23 U.S.C. § 129. The M.L.K. Bridge has been designated a part of the Federal-aid urban system and contrary to plaintiffs' reading of 23 U.S.C. § 103(d)(1), "no route on the Federal-aid urban system shall also be a route on any other Federal-aid system". Thus, the M.L.K. Bridge cannot be integrated into the Interstate System under 23 U.S.C. § 129. Count VI states no cause of action as a matter of law and will be dismissed.

Count VII of plaintiffs' complaint is based upon the Special Urban High Density Program, 23 U.S.C. § 146. Section 146 has been repealed. Act of May 5, 1976, Pub. L. No. 94-280, Title I, § 128(a), 90 Stat. 440. The motions to dismiss Count VII will be granted.

Count VIII alleges that the construction of the Poplar Street Bridge was an unconstitutional impairment of plaintiffs' contract with the City of East St. Louis in violation of Article I § 10 of the United States Constitution. That section, known as the contract clause, provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." The 1956 Trust Agreement entered into between plaintiffs and the City of East St. Louis provides in part:

> The City covenants that, until the bonds secured hereby and the interest thereon shall have been paid or provisions for such payment shall have been made, it will not construct or cause or permit (where such permission is necessary) to be constructed a bridge, any part of which lies within the corporate limits of the City, and which will, or may, divert traffic from the Veterans Memorial Bridge with a resultant decrease in revenues derived from the operation of the Veterans Memorial Bridge.

Defendants have for the most part failed to address this theory of recovery in their motions to dismiss. It is clear that the contract clause is only a limitation of state powers. No cause of action based on this theory lies against the United States government. *The Sinking Fund Cases*, 99 U.S. (9 Otto) 700 (1898); *Hepburn v. Griswold*, 75 U.S. (8 Wall) 603 (1869). As to the other defendants named in Count VIII, the Court

believes that plaintiffs have stated a cause of action. The Court notes that Count VIII states no claim against the State of Missouri or the Illinois State Toll Highway Authority.

Count IX of plaintiffs' complaint seeks an order under the Illinois Toll Highway Act, Ill. Rev. Stat., c. 121, § 100-1 *et seq.* (1975), compelling defendants to acquire the M.L.K. Bridge and retire the bonds. Section 100-8(f) of that Act prohibits the Illinois Toll Highway Authority from purchasing bridges whose bonds are in default. Thus the relief requested is not authorized by the Act and defendants' motions to dismiss Count IX will be granted.[3]

As all nine Counts of plaintiffs' complaint have been dismissed as to the Missouri defendants and the Illinois State Toll Highway Authority, those parties will be dismissed from this action. With only Count VIII remaining, the Court questions whether venue is proper. The parties are hereby ordered to brief this question for the Court. Defendants are granted ten (10) days to file suggestions and plaintiffs are granted ten (10) days from that time in which to reply.

Dated this 11th day of March, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

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[3] Plaintiffs assert that the Illinois legislature enacted §100-8(f) solely to avoid an obligation to purchase the M.L.K. Bridge and that such action constituted a denial of due process. The decision of whether to purchase an existing bridge, however, is vested in the discretion of the Illinois Toll Highway Authority. Ill. Rev. Stat. c. 121, §100-32 (1975). Thus the Illinois Toll Highway Act did not grant plaintiffs a vested right to have their interests purchased. Under these circumstances there could be no denial of due process as a matter of law.

ANSWER
Of the City of East St. Louis and William Mason, Individually and as Mayor of the City of East St. Louis

(Filed in U.S. District Court August 16, 1976)

Now come defendants City of East St. Louis and William Mason, Individually and as Mayor of the City of East St. Louis, answering plaintiff's complaint, state:

First Defense

The complaint fails to state a claim against these defendants upon which relief can be granted.

Second Defense

These defendants, William Mason, individually and as Mayor of the City of East St. Louis and the City of East St. Louis, answering that portion of the complaint designated as Jurisdiction and Venue, and Service of Process and The Parties, states:

1. These defendants, in answering Paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 13 and 14, state that the allegations are purely conclusions of the pleader and the same may or may not be true as either a matter of law or fact, so denies the same.

2. These defendants deny the averments of Paragraphs 7 and 11.

3. They admit the averments of Paragraph 15.

4. These defendants state they have no knowledge sufficient to form a belief as to the truth of the averments of Paragraphs 16, 17, 18 and 19 at this time and so deny the same.

5. They admit the averments of Paragraphs 20, 21, 22, 23 and 24.

6. They deny the averments of Paragraphs 25 and 26.

7. They state they have no information sufficient to form a belief as to the truth of the averments concerning plaintiffs ownership of bridge bonds at this time so deny the same; they admit the remaining averments of said paragraph.

These defendants answering that portion of the complaint pertaining to Class Action Allegations state:

1. They have no information sufficient to form a belief as to the truth of the averments contained in Paragraph 1 at this time so deny the same.

2. They admit the averments of Paragraphs 2(a), 2(b) and 2(c); but state they have no information sufficient to form a belief as to the truth of the averments of Paragraph 2(d) at this time.

3. They admit the averments of Paragraph 3.

These defendants, answering that portion of the complaint pertaining to Statement of Claim, state:

1. They admit the averments of Paragraph 1.

2. They admit the averments of Paragraph 2.

3-8. While the defendant William Mason has no personal knowledge of the truth of the averments of Paragraphs 3, 4, 5, 6, 7 and 8, individually or as Mayor, he understands that the averments of Paragraphs 3, 4, 5, 6, 7 and 8 are true and correct.

9. These defendants answering the averments of Paragraph 9 state they do not have information sufficient to form a belief

as to the truth of averments of Paragraph 9 at this time so denies the same and demands strict proof thereof.

10. They admit the averments of Paragraph 10.

11-12. They state they do not have information at this time sufficient to form a belief as to the truth of the averments of Paragraphs 11 and 12 so deny the same and demand strict proof thereof.

13. Answering the averments of Paragraph 13, they state they do not have information at this time sufficient to form a belief as to the truth of the averments of Paragraph 13 so deny the same and demand strict proof thereof.

14. They state they do not have sufficient information at this time to form a belief as to the truth of the averments of Paragraph 14 so deny the same and demands strict proof thereof.

15. In answering Paragraph 15, these defendants admit the averments of Paragraph 15.

16. Answering Paragraph 16 these defendants admit that the defendants, United States of America and the Department of Transportation of the State of Illinois and the State Highway Commission of Missouri did reach a conclusion that a new Free Bridge should be built over the Mississippi River connecting the State of Illinois with the State of Missouri at an appropriate place to be determined after public hearings on the matter and that at said public hearings the City of East St. Louis objected to the construction of a bridge which would be competitive with the MLK Bridge, which objections were overruled by Federal and State of Illinois authorities and in building said new bridge known as the Poplar Street Bridge diverted traffic which would traverse the MLK Bridge to the Federally financed Poplar Street Bridge and charged no toll. In its access design the builders of the Poplar Street Bridge clearly favor, by the construction of the access route, the use of the Poplar Street Bridge.

17. They admit the averments of Paragraph 17.

18. They admit the averments of Paragraph 18.

19. They admit the averments of Paragraph 19.

20. They admit the averments of Paragraph 20.

21. They admit the averments of Paragraph 21.

22. They admit the averments of Paragraph 22.

23. They admit the averments of Paragraph 23.

24. They admit the averments of Paragraph 24.

25. They admit the averments of Paragraph 25.

26. Answering Paragraph 26 they state that not all bonds have been paid a "small amount" for the probable reason that they are bearer bonds and the ownership is unknown but admit the remaining averments of said paragraph.

27. Answering Paragraph 27 they state that all bondholders have had the value of their bonds depreciated greatly by reason of the competitive nature of a Free Bridge which parallels and is in close proximity of the MLK Bridge which is a toll bridge.

27-A. Answering Paragraph 27-A, these defendants state that it might have been a moral obligation of the United States of America and the Highway authority of the States of Missouri and Illinois to build a bridge across the Mississippi River connecting the City of St. Louis with the City of East St. Louis, but they knew of no legal obligation at that time for the Federal and State authority to build such a bridge.

27-B. They admit the City of East St. Louis did arrange to sell bonds to private investors to finance the bridge through revenue bonds. They state they have no information sufficient at this time to form a belief as to the truth of the remaining averments.

27-C. Answering the averments of Paragraph 27-C, these defendants state that they do not at this time have knowledge that the United States of America entered into any agreement with them to build the MLK Bridge but such evidence might be available. Defendant, City of East St. Louis, was never discouraged in its building of said bridge.

27-D. Answering Paragraph 27-D these defendants state that the defendant, City of East St. Louis, was never discouraged by the defendant United States of America to build said Expressway Extension project and said refunding operations but instead did give its authority for such refunding and construction of Expressway Extension.

Further answering said paragraph, they state they do not have information at this time (but such might be available) sufficient to form a belief as to the truth of the remaining averments of said paragraph so deny the same and demand strict proof thereof.

27-E. These defendants state that the only commitments made by the City of East St. Louis was contained in a brochure which explained to the proposed purchasers of bonds on the MLK Bridge as to the future of the revenues expected to result from tolls to be paid by the users of said MLK Bridge.

Further answering said subparagraph, these defendants state that the building of said Poplar Street Bridge did divert substantially all the traffic and revenue of the MLK Bridge to the detriment of all revenue bondholders.

27-F. They deny the averments of Paragraph 27-F.

27-G. They admit the averments of Paragraph 28-G.

28. Answering Paragraph 28, these defendants state that all bondholders have suffered by reason of the building of the Poplar Street Bridge by the United States of America and

making the use of same free it is depriving the MLK Bridge of any tolls which were to be the revenues to pay off the principal and interest of refunding bonds.

These defendants deny that they committed any harm or wrongs to the many bondholders.

29. Answering Paragraph 29, these defendants state that if such prayer is appropriate they have no objection to the granting of such relief.

Count Two

1. These defendants, i.e., William Mason, Mayor of the City of East St. Louis, and City of East St. Louis, answering Count II of plaintiff's complaint, repeat and reaver their answers to each of the Paragraphs set forth in Count I above as completely and fully as if set forth in their entirety at this point in the complaint.

2. Answering Paragraph 2 of Count II of plaintiff's complaint, these defendants state that the Martin Luther King Bridge is in safe condition and can be safely traversed without danger to the traveling public.

Further answering, they state that constant repairs are necessary to keep the bridge in an operable condition but it has been and is now in a usable condition for highway traffic.

Further answering, these defendants state that declining revenues might some time in the future bring about inadequate revenues to keep the bridge in a more desirable condition and that the declining revenues were brought about by the construction and operation of the Poplar Street Bridge as a part of the interstate system.

3. Defendants admit the averments of Paragraph 3.

4. Answering Paragraph 4 these defendants state that section 104(b) of 23 U.S. Code does imply the conclusions of the plaintiff as alleged in Paragraph 4.

Further answering said paragraph states that the law as quoted by the plaintiffs imply the interpretation given it by the plaintiffs but that the revenues from the tolls collected from said bridge are the only source of revenue for the maintenance of the bridge and that Chapter 121, Paragraph 10-101, 102, et seq., Illinois Revised Statutes, specifically provides inter alia that the State of Illinois cannot accept the bridge as long as it is encumbered by indebtedness.

Further answering said Paragraph these defendants state neither the City of East St. Louis nor William Mason, its present Mayor, has the power or the authority to aid the MLK Bridge as a portion of the interstate highway system, either primarily, secondary or urban provisions of the Federal Highway Act however desirable such a result might be.

Count III

1. Now comes the defendants, William Mason, individually and as Mayor of the City of East St. Louis, and the City of East St. Louis, and restate and reallege its answers to each of the paragraphs contained in Count I of plaintiffs' complaint and in Count II of plaintiffs' complaint as if fully set forth herein.

2. Answering Paragraph 2 of Count II these defendants state that the MLK Bridge is in useful service, is safe in all respects for vehicular traffic and has been so since its construction. Further maintenance and the payment of interest and principal on the bonds require additional revenues from which said bridge has been deprived of because of lack of patronage brought about the competitive free bridge, i.e.,

Poplar Street Bridge, constructed solely out of Federal funds under the Federal statutes pertaining thereto.

Defendants further answering, state that it would be desirable to designate the MLK Bridge as a part of the federal-aid urban highway system as defined in Title 23 U.S.C. § 103(d)(1) or any other provision contained in the Federal Highway Act as amended.

3. Answering Paragraph 3, these defendants state that they have no authority to designate the MLK Bridge as a part of the federal-aid urban highway transportation system, except perhaps if it is acquiescenced thereto.

Further answering, these defendants state that all the bondholders holding bonds secured by revenues from the MLK Bridge should be paid in full for their investment in said bridge but the tolls therefrom have been inadequate since the opening of the Poplar Street Bridge to pay such obligations.

Further answering, they state they have no authority to add said bridge to the Federal primary, secondary or urban system.

Count IV

Now comes William Mason, individually and as Mayor of the City of East St. Louis and the City of East St. Louis and answering Count IV states:

1. They restate and reaver as their answers to Paragraph 1 of Count IV their answers to each of the allegations set forth in each paragraph of Counts I, II and III above.

Count V

1. These defendants answering Count V repeat and reaver their answers to each and every allegation contained in Counts I through IV above as if specifically set forth in haec verba.

Defendants do not answer remaining averments of Paragraph 1 of Count V or Paragraph 2 of Count V for the reason that no relief is sought against them in said count.

Count VI

1. These defendants, answering Count VI of Plaintiffs' Complaint repeat and reallege each of their answers to the allegations set forth in Counts I through V above as if fully set forth in haec verba.

Further, these defendants state that no further answer need be made by them to this count because no relief is sought against them in said count.

Count VII

1. These defendants, answering Count VII of Plaintiffs' Complaint repeat and reallege each of their answers to the allegations set forth in Counts I through VI above as if fully set forth in haec verba.

Further answering the averments in said count, state they do not answer any further averments as contained in Paragraphs 2 and 3 because no relief is sought against them in Count VII.

Additional Defense of William Mason Individually

Now comes William Mason, individually and as a defense to plaintiffs' complaint states that he was elected Mayor to the City of East St. Louis in 1975; that he served in no official capacity in the City of East St. Louis until his election as Mayor; that all facts set forth in plaintiffs' complaint occurred prior to 1975 and he was not privy to the averments as it pertains to him individually; that there are no averments in said complaint

which indicate or allege that he in his individual capacity did perform any of the matters and things set forth in plaintiffs' complaint; that he now as Mayor of the City of East St. Louis, is the governing head of the City of East St. Louis and would be subject only to what duties are imposed upon him by law and this Court may order him to do in his official capacity and not in his individual capacity.

WILLIAM MASON
Individually and as Mayor of the
City of East St. Louis

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